# In the Supreme Court of the United States

OCTOBER TERM, 1909.

THE STATE OF OKLAHOMA, COMPLAINANT,

*vs.*

THE ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY,

RESPONDENT.

TO THE JUDGES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Your oratrix, the State of Oklahoma, complainant, by Charles West, its Attorney General, hereby prays leave to file this its bill of complaint hereto at-

tached, and for process and order upon the defendants therein named to answer or demur to the same as herein prayed.

CHAS. WEST,
*Attorney General of the State of Oklahoma.*

E. G. SPILMAN,
*Assistant Attorney General,*
*Solicitors for Complainant.*

# In the Supreme Court of the United States

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THE STATE OF OKLAHOMA, COMPLAINANT,

*vs.*

THE ATCHISON, TOPEKA, AND

SANTA FE RAILWAY COMPANY,

RESPONDENT.

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# BILL OF COMPLAINT

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TO THE JUDGES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Your oratrix, the State of Oklahoma, by Chas. West, Atorney General thereof, brings this its bill of complaint against The Atchison, Topeka and Santa Fe Railway Company, a corporation organized under and by virtue of the laws of the State of Kansas and a citizen of that state, and alleges that a controversy has

arisen between said State and the respondent respecting the right of the respondent to operate a railway upon certain lands in the State of Oklahoma hereinafter more particularly described and to make certain charges for freight transportation.

1. That by an Act of Congress entitled "An Act to Enable the People of Oklahoma and the Indian Territory to Form a Constitution and a State Government and be Admitted into the Union," approved June 16, 1906, the staid State of Oklahoma was admitted into the Union upon an equal footing with the original states.

2. That said The Atchison, Topeka and Santa Fe Railway Company is a corporation organized under and by virtue of the laws of the State of Kansas, and is a citizen of that state authorized to do the general business of a common carrier by steam railway.

3. That by the treaty made between the United States and the French Republic at Paris on the 30th day of April, 1803, the Territory of Louisiana was ceded to the United States, among other conditions, upon the expressed condition that the inhabitants of the ceded territory should be incorporated into the Union of the United States and admitted as soon as possible according to the principles of the Federal Constitution and to the enjoyment of all the rights, advantages and immunities of the citizens of the United States, and that in the meantime they should be maintained and proctected in the free enjoyment of their liberty, property, and the religion which they profess.

4. That the State of Oklahoma is formed out of a part of the territory ceded to the United States by said treaty with the French Republic, and that the

only authority of the United States in said territory was for the purpose of temporary government, to hold the domain in trust for the performance of the stipulations and the conditions expressed in the deed of cession and the legislative acts connected therewith; and that the United States never held any municipal sovereignty, jurisdiction or right of soil in and to the territory of which the State of Oklahoma was formed except for temporary purposes of government only; that the United States was given the control over the public lands but that the said control over the said public lands was temporary only and remained in the United States as trustee for the State of Oklahoma.

5. That by an act of Congress of the United States approved July 4th, 1884, entitled "An Act to Grant the Right-of-way through the Indian Territory to the Southern Kansas Railway Company, a corporation poses," it was provided, among other things, that the Southern aKnsas Railway Company, a corporation created under and by virtue of the laws of the State of Kansas, was granted right of way to maintain a railway and telegraph and telephone lines,

"beginning at a point on the northern line of said territory where an extension of the Southern Kansas Railway from Winfield in a southerly direction would strike said line, running thence south in the direction of Denison, in the State of Texas, on the most practicable route, to a point at or near where the Washita River empties into the Red River, with a branch constructed from a point at or near where said main line crosses the northern line of said territory, westwardly along or near the northern line of said territory, to a point at or near where Medicine Lodge Creek crosses the northern line of said territory, and from that point in a southwesterly direction, crossing Beaver Creek at or near Camp Supply, and reaching the west

line of said Indian Territory at or near where Wolf Creek crosses the same."

that said grant was made upon the specific condition that said railroad company should not charge the inhabitants of said territory a greater rate of freight that the rate authorized by the laws of the State of Kansas for transportation or services of the same kind.

6. That said Southern Kansas Railway Company accepted said grant and that the line of railway now operated in the State of Oklahoma by respondent is operated upon the grant given by said act approved July 4, 1884, and that all the conditions applicable to the original grantee apply to respondent. That ever since the respondent took over the operation of said line of railway under said grant it has continuously and continually violated the said condition of charge in that it has charged the inhabitants of said territory a greater rate of freight than the rate authorized by the laws of the State of Kansas for services or transportation of the same kind; and that said violation has been open, notorious and continuous, and that the tariffs of freight charges prepared by the respondent which are in the control of the respondent for the state of Kansas and for the Territory of Oklahoma and Indian Territory show in detail said excessive charges and are not known in detail to complainant.

7. That said respondent, The Atchison, Topeka and Santa Fe Railway Company actually operates the right-of-way of said Southern Kansas Railway Company and has continuously and continually as aforesaid violated the said condition of said grant and threatens, unless restrained, to continue so to do. That at this time over the lines of said The Atchison, Topeka and Santa Fe Railway Company, by Santa Fe Tariff No.

6240-A, the rates on lime, cement and plaster, intrastate in the State of Oklahoma are as follows:

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| For | 5 | miles | and | under, | 4 | cts. | per | 100 | lbs. |
| " | 25 | " | " | " | 5.25 | " | " | " | " |
| " | 50 | " | " | " | 7. | " | " | " | " |
| " | 75 | " | " | " | 8.25 | " | " | " | " |
| " | 100 | " | " | " | 9.50 | " | " | " | " |
| " | 200 | " | " | " | 12.75 | " | " | " | " |
| " | 300 | " | " | " | 16.50 | " | " | " | " |
| " | 400 | " | " | " | 20.00 | " | " | " | " |

For transportation of the same kind in Kansas, said The Atchison, Topeka and Santa Fe Railway Company is authorized by the laws of Kansas by legislative enactment of May 29, 1909, following Missouri Pacific Tariff No. 1275, Supplement 10, to charge the following amounts only:

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| For | 5 | miles | and | under, | 3.5 | cts. | per | 100 | lbs. |
| " | 25 | " | " | " | 4.5 | " | " | " | " |
| " | 50 | " | " | " | 6. | " | " | " | " |
| " | 75 | " | " | " | 7.5 | " | " | " | " |
| " | 100 | " | " | " | 8.25 | " | " | " | " |
| " | 200 | " | " | " | 12.00 | " | " | " | " |
| " | 300 | " | " | " | 16.5 | " | " | " | " |
| " | 400 | " | " | " | 20.0 | " | " | " | " |

For brick in the State of Oklahoma said respondent by said tariff named charges the following amount:

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| For | 5 | miles | and | under, | 2.5 | cts. | per | 100 | lbs. |
| " | 25 | " | " | " | 3.75 | " | " | " | " |
| " | 50 | " | " | " | 5.0 | " | " | " | " |
| " | 75 | " | " | " | 5.75 | " | " | " | " |
| " | 100 | " | " | " | 6.25 | " | " | " | " |
| " | 200 | " | " | " | 8.75 | " | " | " | " |
| " | 300 | " | " | " | 11.25 | " | " | " | " |
| " | 400 | " | " | " | 13.75 | " | " | " | " |

And in the State of Kansas under said legislative authority charges the following sums only:

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| For | 5 | miles | and | under, | 2.25 | cts. | per | 100 | lbs. |
| " | 25 | " | " | " | 3.5 | " | " | " | " |
| " | 50 | " | " | " | 4.5 | " | " | " | " |
| " | 75 | " | " | " | 5.25 | " | " | " | " |
| " | 100 | " | " | " | 5.75 | " | " | " | " |
| " | 200 | " | " | " | 7.75 | " | " | " | " |
| " | 300 | " | " | " | 10.00 | " | " | " | " |
| " | 400 | " | " | " | 12.25 | " | " | " | " |

And for crude oil as shown by said tariff in Oklahoma charges the following:

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| For | 5 | miles | and | under, | 5. | cts. | per | 100 | lbs. |
| " | 25 | " | " | " | 6. | " | " | " | " |
| " | 50 | " | " | " | 9. | " | " | " | " |
| " | 100 | " | " | " | 19. | " | " | " | " |
| " | 200 | " | " | " | 31. | " | " | " | " |
| " | 300 | " | " | " | 36. | " | " | " | " |
| " | 400 | " | " | " | | " | " | " | " |

For the transportation of the same product in the State of Kansas by legislative enactment as shown by Frisco Tariff No. 140-B, the following:

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| For | 5 | miles | and | under, | 2.5 | cts. | per | 100 | lbs. |
| " | 25 | " | " | " | 4.5 | " | " | " | " |
| " | 50 | " | " | " | 5.5 | " | " | " | " |
| " | 100 | " | " | " | 7. | " | " | " | " |
| " | 200 | " | " | " | 9. | " | " | " | " |
| " | 300 | " | " | " | 11. | " | " | " | " |
| " | 400 | " | " | " | 13. | " | " | " | " |

For refined oil in the State of Oklahoma said respondent by said tariff charges the following amount:

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| For | 5 | miles | and | under, | 3.5 | cts. | per | 100 | lbs. |
| " | 25 | " | " | " | 5.0 | " | " | " | " |
| " | 50 | " | " | " | 8.0 | " | " | " | " |
| " | 100 | " | " | " | 12.5 | " | " | " | " |
| " | 200 | " | " | " | 18.5 | " | " | " | " |
| " | 300 | " | " | " | 25. | " | " | " | " |
| " | 400 | " | " | " | 31. | " | " | " | " |

And in the State of Kansas under legislative authority charges the following sums only:

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| For | 5 | miles | and | under, | 2.5 | cts. | per | 100 | lbs. |
| " | 25 | " | " | " | 4.5 | " | " | " | " |
| " | 50 | " | " | " | 5.5 | " | " | " | " |
| " | 100 | " | " | " | 7. | " | " | " | " |
| " | 200 | " | " | " | 9. | " | " | " | " |
| " | 300 | " | " | " | 11. | " | " | " | " |
| " | 400 | " | " | " | 13. | " | " | " | " |

That the State of Oklahoma at this time has about two million inhabitants, is developing and building towns, villages, and individual farmhouses, and that lime, cement, plaster, brick and stone are very essential to its growth; that at this time in the State of Oklahoma there are very large and extensive petroleum oil wells and the manufacture or refining of the same is an industry continually growing in said state. That the transportation rates on crude and refined oil, lime, cement, plaster, brick and stone are very important and essential to the development of said State, and that the violation by said respondent of the said conditions of said grant is a menace t othe future of said State.

Your oratrix further alleges that if the defendant is permitted further to operate said railroad in violation of said condition of said grant, it will be to the hindrance and injury of the growth of said state and and an injury to the property rights of its inhabitants.

That your oratrix has and can have no adequate remedy or relief by action at law except as herein prayed for in equity.

To the end, therefore that the defendant, The Atchison, Topeka and Santa Fe Railray Company may, if it can, show cause why your oratrix should not have the relief herein prayed for and that it may be com-

pelled to answer all the matters and things herein stated as fully and particularly as if they were here again repeated, and said company thereunto interrogated, and that the defendant may be required to answer without oath, its answer under oath being hereby expressly waived; and that the grant made by said Act of July 4, 1884, be by order of this court cancelled and held for naught, and the property thereby granted be confirmed and decreed to be in the State of Oklahoma as *cestui que trust*, and that the defendant may by the decree of this court be perpetually enjoined and restrained, and pending the determination of this action be enjoined and restrained from charging the inhabitants of the State of Oklahoma a greater rate of freight than the rate authorized by the laws of the State of Kansas for services or transportation of the same kind, and from charging in the Said Santa Fe Tariff No. 8240-A for lime, cement, plaster, brick, stone, crude and refined oil, the rates therein specified in so far as the same are greater than the said rate authorized for the like transportation by the laws of the State of Kansas, until the determination of this cause; and that for the continuous and continual violation of the terms of said grant the said respondent be perpetually enjoined and restrained from operating in the State of Oklahoma a railroad therein.

And that your oratrix further prays the leave of this court to amend this, its bill of complaint, if amendment thereto shall become necessary, including the right to bring in other parties defendant for the purpose of giving force and effect to any decree that may be made by the court herein.

And that complainant be granted such other and further or different relief as the nature of this case

may require, and as shall be agreeable to equity and good conscience.

CHAS. WEST,
*Attorney General of the State of Oklahoma.*

E. G. SPILMAN,
*Assistant Attorney General,*
*Solicitors for Complainant.*

COUNTY OF LOGAN,
STATE OF OKLAHOMA. } ss.

Charles West, being first duly sworn, upon oath says that he is the Attorney General of the State of Oklahoma, and was such at all of the times named herein since the 16th day of November, 1907; and that he has read the foregoing bill and has made inquiry of persons likely to know the truth of the same and believes the facts stated therein are true.

CHARLES WEST,
*Attorney General of the State of Oklahoma.*

Subscribed and sworn to before me this 10th day of May, 1910.

JULIET WRIGHT,
*Notary Public.*

My Commission Expires Dec. 19, 1911.

IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1969

## No. 13 Orig.

THE STATE OF OKLAHOMA,
*Complainant,*

*vs.*

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
*Respondent.*

## SUGGESTIONS OF RESPONDENT IN OPPOSITION TO MOTION FOR LEAVE TO FILE BILL OF COMPLAINT.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
By GARDINER LATHROP,
ROBERT DUNLAP,
*Its Solicitors.*

A. B. BROWNE,
*Of Counsel.*

GUNTHORP – WARREN PRINTING CO., CHICAGO

IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1909.

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No.

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THE STATE OF OKLAHOMA,
*Complainant,*

*vs.*

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
*Respondent.*

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## SUGGESTIONS OF RESPONDENT IN OPPOSITION TO MOTION FOR LEAVE TO FILE BILL OF COMPLAINT.

The bill of complaint proposed to be filed purports to be filed and the suit to be brought by the Attorney General of Oklahoma, but without authority or request from the Governor of that State. Such authority was not given and no such request was made.

It has been decided by the Supreme Court of Oklahoma in *State ex rel. Haskell, Governor,* v. *Huston, Judge of Eleventh Judicial District, et al.,* 97 Pacific, 982, decided August 29, 1908, that the Attorney General of that state has no power to bring a suit in the name of the state or to prosecute or defend the same in any other court than the Supreme Court of the state in any civil or criminal cause in which the state

may be a party or interested except when requested by the Governor or either branch of the legislature.

The Attorney General proposes to file a bill of complaint in this court on behalf of the State of Oklahoma without authority or request from the Governor of the State, and without authority so to do from the laws of such state.

Leave should not be granted to file the above complaint, the filing of which could only have the effect of affecting the securities of the Railway Company, because it is quite apparent that the bill does not set up a controversy between the State of Oklahoma and The Atchison, Topeka and Santa Fe Railway Company, and that the State of Oklahoma is not entitled to the relief of forfeiture of the right of way held by the Railway Company or otherwise under or by virtue of the Act of Congress referred to in the bill.

As suggested in the bill of complaint, a part of the line of railway operated by The Atchison, Topeka and Santa Fe Railway Company, now in the State of Oklahoma, was constructed under authority of an Act of Congress approved July 4, 1884, being Chapter 179, Volume 23, United States Statutes at Large, page 73, entitled "An Act to grant the right of way through the Indian Territory to the Southern Kansas Railway Company and for other purposes."

Section 2 of that Act granted a right of way through "the Indian Territory."

Section 4, relied upon, provides:

> "That said railroad company shall not charge *the inhabitants of said Territory* a greater rate

of freight than the rate authorized by the laws of the State of Kansas for services or transportation of the same kind," etc.

Provision is then made in respect to authority over the rates on the line of railroad in question in case a state government or governments shall exist in "said Territory."

In the first place, the prohibition, according to its plain terms, is against charging "*inhabitants* of the Indian Territory" greater rates than those prescribed by the laws of Kansas for the same kind of service or transportation. Very appropriately the statute made no provision concerning what might be charged within a future state, when the same should be carved out of the territory, to the *citizens* thereof, because such charges were then subjected by the same section of the Act of Congress to the regulating power of the state as to intrastate freight, and to that of the Federal government as to interstate freight.

The provision quoted was intended as temporary only and to protect against exorbitant charges the "*inhabitants*" of the Territory in whose favor there existed then no regulating power over rates other than that of Congress. But upon the creation of the State of Oklahoma there of course ceased to be any "inhabitants of said Territory."

Moreover, the Act of Congress in question was passed under the power of that body to regulate commerce among the several States and with the Indian tribes.

*Cherokee Nation* v. *Southern Kansas Railway Company*, 135 U. S., 641.

The grant is from the Federal government acting through Congress and that government alone would have the right of supervision and enforcement of the provisions of that Act, or the right to forfeit the grant upon some ground justifying a forfeiture. Only the grantor has the right of forfeiture, if any such right exists.

In Section 12 of the Act it is carefully provided that "Congress may at any time amend, add to, alter or repeal this Act." It thus clearly appears that Congress or the Federal government alone has authority to act where it is contended or claimed that the provisions of the foregoing Act of Congress have not been complied with.

The State of Oklahoma did not make the grant and evidently only possesses such power in respect to intrastate rates as was reserved by the Act of Congress in favor of such State which it was expected might thereafter be created over the Indian Territory.

We respectfully submit that upon the face of the bill no ground for the relief asked on behalf of the State is set up and that it is apparent that the bill is filed without the request of or requisite authority from the Governor of the State.

Respectfully submitted,

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

By GARDINER LATHROP,

ROBERT DUNLAP,

*Its Solicitors.*

A. B. BROWNE,

*Of Counsel.*

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

## No. 13, Original.

THE STATE OF OKLAHOMA, COMPLAINANT,

*vs.*

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, DEFENDANT.

## MOTION TO ASSIGN.

Come now the parties to the above-entitled cause and move that the demurrer of the defendant to the bill of complaint herein be assigned for argument by the court on any date after the first day of January, 1911, to suit the convenience and business of the court, an early assignment after that date being requested.

CHAS. WEST,
*Attorney General of the State of Oklahoma and Solicitor for Complainant.*

GARDINER LATHROP,
ROBERT DUNLAP,
S. T. BLEDSOE,
A. B. BROWNE,
*Solicitors for Defendant.*

IN THE

# SUPREME COURT

OF THE

# UNITED STATES

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OCTOBER TERM, 1910.

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THE STATE OF OKLAHOMA,
*Complainant,*

vs.

THE ATCHISON TOPEKA AND SANTA FE RAILWAY COMPANY,
*Respondent.*

No 13. Original.

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## BRIEF AND ARGUMENT.

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### STATEMENT

During the October term, 1909, in May, 1910, by leave of this court the bill was filed herein. In short it alleged:

p. 2, That Oklahoma was a state of the federal union.

p. 2, That Respondent is a Kansas corporation, a steam railway.

p. 2, That Oklahoma is a part of the Louisiana purchase.

p. 3, That by Act of Congress, July 4, 1884, p. 73 et seq. vol. 23, U. S. Stat. at Large, right of way through the Indian Territory was granted to *Southern Kansas Railway Company.*

p. 4, Which accepted the grant.

p. 4, That respondent operates the grant.

p. 4, That a condition to the grant was that a greater rate for freight should not be made than authorized by the laws of Kansas for services of the same kind.

p. 4, That respondent has continuously violated said condition.

p. 4-7, Part of the details of the breach of condition.

p. 7, That the State is growing very rapidly and needs the articles upon which respondent charge excessive rates.

p. 7, That complainant has no adequate remedy at law.

The Prayer asked:

1. That the grant be forfeited to the State.

2. That respondent be enjoined from making such excessive charges.

3. That respondent be restrained from operating a railroad in Oklahoma.

4. For leave to amend if necessary.

The respondent was allowed to file a demurrer, on the ground, p. 1-2

"That said complainant has not in and by said bill made or stated any cause of controversy" within the jurisdiction of this court.

## BRIEF

### I. In Short

The points attempted by respondent are thus substantially stated and met:

PRELIMINARY

A. It claims there is a want of authority in the Attorney General of Oklahoma to file this bill, citing:

State, ex rel Haskell vs. Huston, et al, 97 Pac. 982.

*I answer:*

(a). Authority will be presumed.

Leedy vs. Brown, Oklahoma, unreported; decided Nov. 16, 1910.

(b). Custom of this court.

Minnesota vs. Northern Securities Co., 184 U. S., 199;

Florida vs. Anderson, et al., 91 U. S. 667.

B. It claims there is a lack of allegations to base upon them relief in equity, citing:

In re Sawyer, 124 U. S., 200;

Missouri Pacific Co. vs. U. S., 189 U. S. 274;

Atty. Gen. vs. Utica Ins. Co., 2 Johns. Ch., 371.

*I answer*:

The bill seeks:

1. To cancel a grant for breach in condition subsequent.

2. To enjoin exaction of excessive charges.

Atty. Gen. vs. Gt Northern Co., 6 Jur., (N. S.) 1006.

3. To enjoin respondent from using ultra vires the grant to the Southern Kansas.

Oregon R. Co. v. Oregonian Ry. Co. 130 U. S. 1.

The joinder of these three makes clear the inadequacy of procedure at law.

U. S. vs. Union Pac. Co. 160., U. S. 1.

C. It claims that State has no justiciable rights involved.

*I answer*:

The wrongs affected the public at large.

In re Debs, 158 U. S. 564.

They hinder the commerce of the State.

Pennsylvania v. Wheeling B. Co., 13 How. 519;

Georgia v. Tennessee Co., 206 U. S. 230.

## The Merits.

Respondent contended:

A. That the United States alone and not Oklahoma could enforce obedience to Act of July 4, 1884.

*I answer*:

1. That the United States cannot regulate internal commerce of the state.

2. That the United States cannot execute a trust in a state.

U. S. v. Ill. Central, 154 U. S. 239.

3. That after the primary disposal of the soil the control of the United States is ended.
Shively v. Bowlby, 152 U. S. 1.

4. That the act expressly provides that the reversion should be to the Indian Tribes. Since the abolition of these, the state has now the trust in it for the public.

Pollard vs. Hagan, 3 How. 212.

B. That the Act ceased to Operate after Statehood.

*I answer*:

1. That the Act expressly looks forward and makes provision after statehood.

2. That as to passenger fares it expressly provides that forever the maximum shall be three cents.

3. That the purpose of the act is to provide maxima beyond which the road should not charge, not to fix rates.

Noyes, American Railway Rates, p. 214;

Haines v. C. R. I. & P. Ry. Co., 13 I. C. R. 214.

## II. These Positions are to be Stated Thus, at Greater Length

As to preliminaries:

*A. The Attorney General of Oklahoma has authority to file bill.*

Leedy v. Brown, unreported, Okla.

State v. Welbes, 73 N. W. 820;

St. L. & S. F. v. Hadley, 161 Fed. 419;

U. S. v. San Jacinto Tin Co., 125 U. S. 273, Ex parte Young, 209 U. S. 123;

Act of June 18th, 1910.

Rules made for Chisholmn v. Georgia, 2 Dall 479;

Minn. v. Northern Sec. Co., 184 U. S. 199;

Florida v. Anderson, 91 U. S. 667;

*B. The state has justiciable rights here:*

Penn. v. Wheeling B. Co., 13 How. 519;

So. Car. v. Ga., 93 U. S. 4;

Wisconsin v. Duluth, 96 U. S. 379;

In re Debs, 158 U. S. 564;

Louisiana v. Texas, 176 U. S. 1;

Kansas v. Colorado, 185 U. S. 141;

Georgia v. Tennessee Co., 206 U. S. 238;

Hudson Water Co. v. McCarter, 209 U. S. 355.

C. *If Equity should take jurisdiction for a part it will retain jurisdiction for complete relief and not force separation of efforts in suits at law.*

U. S. v. Union Pac. Co. et al., 160 U. S. 1.

*Equity jurisdiction enjoins illegal acts by corporations affecting public at large:*

Attorney General v. Great Northern Co.,

62 Eng. Rep. Reprint 337;

S. C. 29 L. J. Ch. 794;

6 Jur. (N. S.) 1006;

8. W. R. 556.

Attorney General v. Delaware R. Co. 27 N. J. Eq. 631;

Muncie Nat. Gas. Co. v. Muncie (Ind.), 60 L. R. A. 822;

Gas Light Co. v. Zanesville, 47 Oh. St. 35;

Attorney General v. Jamaica Pond Co., 123 Mass. 361;

Attorney General v. Chicago, etc. Co., 35 Wis. 425;

Thompson Corporations 2nd Ed. Secs. 5680 and 5721;

*Injunction to Restrain Excessive Rates:*

Tift et al v. Southern Ry. Co., 123 Fed. 794, and cases there cited.

State v. Pac. Exp. Co. (Neb.) 115 N. W. 719; Madison v. Gas Co. (Wis.) 108 N. W. 65.

## ON THE MERITS.

### A.

### Can the State Ask for a Cancellation of the Grant?

The successor of the grantor has that right.

Schulenberg, vs. Harriman, 21 Wall. 44.

When a territory becomes a state it may refuse recognition of anything that the state might have repudiated if the grant had come from itself in the first instance.

Railroad Company vs. Baldwin, 103 U. S. 431.

If the United States might have forfeited the right before statehood, that power belongs to the state now.

Van Wick vs. Knevals, 106 U. S. 396.

The grants in the Territory purchased from France made for a public purpose create a trust for the public.

New Orleans vs. United States, 10 Pet. 662;

See also: 6 Mo., 524;

Mayor, etc., vs. Eslava, 9 Porter, 577, 602;

Dunham vs. Lamphere, 3 Gray, 268;

Hart vs. Burnett, et al, 15 Calif. 530.

Grant made Southern Kansas was for a public purpose.

Cherokee Nation vs. Southern Kansas Ry. 135 U. S. 641.

The United States before statehood might have declared a forfeiture either by legislative action or judicial proceedings.

United States vs. Repentigny, 5 Wall., 211, 267;

Utah N. & C. R. Co. vs. Utah & C Ry. Co. 110 Fed. 879.

Before statehood the United States a trustee for the Territory.

Hinman, et al vs. Warren, 6 Ore. 409;

Pollard's lessee vs. Hagan, et al 44 U. S. 3 How., 212, especially at 220, 221, 222, 223, and this language in 223:

"THE OBJECT OF ALL THE PARTIES TO THESE CONTRACTS OF CESSION WAS TO CONVERT THE LAND INTO MONEY FOR THE PAYMENT OF THE DEBT AND TO ERECT NEW STATES OVER THE TERRITORY THUS CEDED, AND AS SOON AS THESE PURPOSES COULD BE ACCOMPLISHED, THE POWER OF THE UNITED STATES OVER THESE LANDS, AS PROPERTY, WAS TO CEASE."

Until the primary disposal the authority of the

United States to control them is complete, but ends entirely at the primary disposal thereof.

David vs. Rickabaugh, 32 Iowa 543;

Farrington vs. Wilson, 29 Wisconsin 383;

Gibson vs. Choteau, 80 U. S. 13;

Irvine vs. Marshall, 61 U. S. 558;

State vs. Bachelder, 5 Minn. 223;

Shiveley vs. Bowlby, 152 U. S. 1.

Since statehood, the United States has had no authority to cancel the grant or control the trust.

United States vs. Illinois Central, 154 U. S. 225, at 239.

The United States has no control over the internal commerce of a state.

Louisville vs. Mississippi, 133 U. S. 587;

Geer vs. Conn., 161 U. S. 519;

Sands vs. Manistee Co., 123 U. S. 288;

Covington Bridge Co., vs. Ky., 145 U. S. 204.

The primary duty of the company is to the local business.

Lake Shore Railroad vs. Ohio, 173 U. S. 285, at 301;

Cleveland Company vs. Ill., 177 U. S. at 521.

**B.**

Grant is now an act of the State.

Sec. 2 of the Schedule of the Constitution of Oklahoma.

*The Right to Exclude Respondent from Operation in Oklahoma.*

**C.**

The Act of July 4, 1884, Section 2, provides for a reversion to the tribe itself, but all the Indian tribes have ceased to be nations.

A grant to a railroad and its successors and assigns does not give the right to it to sell or assign its property to another corporation.

Oregon Railroad Co. vs. Oregonian R. R. Co., 130 U. S. 1;

Thomas vs. Railroad Co., 101 U. S. 1.

The Southern Kansas Railway had no authority to sell to the respondents.

Briscoe vs. Southern Kansas Railway Co., 40 Fed. 273.

**D.**

*The jurisdiction of this Court if it exists should be Applied.*

Cohens vs. Virginia, 6 Wheat, 404.

California vs. So. Pac., 157 U. S. 229 at 269.

## ARGUMENT

### Has Attorney General of Oklahoma Authority to File Bill?

It is contended by the respondent that the Attorney General was not authorized to bring this action,

and the case of Haskell v. Huston, et al, 97 Pac. 982, is cited as if it supported its contention.

That was a case where the Governor denied the right of the Attorney General to bring an action in the District Courts of that state by therein appearing and moving a dismissal. It was held in that case that the state is to be represented in the district courts of the State by the county attorneys, except where either branch of the legislature or the governor especially request the Attorney General's appearance. Also, it was especially affirmed that in the Supreme Court of the State the Attorney General without special direction should represent the State.

While no decision or reference was made to the Federal courts, whatever analogy even, is to be drawn, is that in this court the Attorney General in his own discretion appears.

However, even in the district courts of the State, if the Attorney General appears, it will be presumed he is authorized. (Leedy v. Brown, et al, unreported, No. 1855, decided Nov. 16, 1910.) The Court said in the syllabus (which is the law of the case under the Oklahoma Statutes, Compiled Laws of 1909, Section 6087, Snyder):

> "When an action is commenced in the district court in the name of the state by the Attorney General, in the absence of an affirmative showing to the contrary, he is presumed to have brought such action after having been requested by the Governor or one of the branches of the legislature."

This holding was based upon State v. Welbes, 11 S. D. 86, 75 N. W. 820, which in turn rests upon Jerauld Co. v Williams, 7 S. D. 196, 63 N. W. 905. So that even if this bill had been filed in a district court of the State as against a demurrer, at least the authority of the Attorney General need not be shown.

But the federal courts will be found by their own file, which is sufficiently stated in

St. L. & S. F. R. R. Co. v. Hadley, 161 Fed. 419;

U. S. v. San Jacinto Tin Co., 125 U. S. 273;
Ex parte Young, 209 U. S. 123.

This court in Chisholm v. Georgia, 2 Dall. 479, required that service of process upon a state be made upon the Governor and Attorney General thereof. The Governor because he represents the state in a political and executive capacity; the Attorney General to represent the State as solicitor in this Court. This rule has subsisted since.

It was recognized as fixed by Congress in the Act of June 18th, 1910, entitled "AN ACT to Create a Commerce Court," etc., in that Section 17 thereof provides that service of notice shall be made upon the Governor and Attorney General of a State whose legislation is sought to be suspended from enforcement by action in a Federal Circuit Court.

The form followed in this bill is generally that of Minnesota v. Northern Securities Co., 184 U. S. 199, Florida v. Anderson, et al, 91 U. S. 667, which, in effect, approve the authority of a state Attorney General to appear for his State.

## Has the State Justiciable Rights?

In Minnesota v. Northern Securities Co. 184 U. S. 199, the court did not pass upon the question whether by bill of injunction in this court a State may compel obedience to its policy forbidding consolidation of competing railroads.

But in Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 519, the threatened obstruction of navigation on the Ohio was treated as an imminent injury to the property of that State.

The similar allegations of this bill are: (p. 7)

> "That the State of Oklahoma at this time has about two million inhabitants, is developing and building towns, villages, and individual farm houses, and that lime, cement, plaster, brick and stone are very essential to its growth; that at this time in the state of Oklahoma there are very large and extensive petroleum oil wells and the manufacture or refining of the same is an industry continually growing in said state. That the transportation rates on crude and refined oil, lime, cement, plaster, brick and stone are very important and essential to the development of said state, and that the violation by said respondent of the said conditions of said grant is a menace to the future of said State.
>
> "Your oratrix further alleges that if the defendant is permitted further to operate said railroad in violation of said condition of said grant, it will be to the hindrance and injury of the growth of said state and an injury to the property rights of its inhabitants."

In South Carolina v. Georgia, 93 U. S. 4 at p. 14, as to an injunction sought to restrain the obstruction of the Savannah River, the bill was dismissed because no unlawful obstruction was shown, but it was doubted whether in order that a state might come into this court it must not show it will sustain some injury such as would allow a private person to maintain a similar action in another court.

In Wisconsin v. Duluth, 96 U. S. 379-382, the case was decided upon the ground that this court cannot undertake to direct in what manner congressional appropriations for river improvement shall be expended. The court refused to pass on the question whether it was necessary that a proprietary interest of the state be injured. That state claimed the right of maintaining and continuing the flow of a channel as an important highway for commerce and navigation in its natural course.

In re Debs, 158 U. S. 564, it was said:

> "That while it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as effect the public at large, and are in respect of matters which by the Constitution are intrusted to the care of the Nation, and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts or

prevent it from taking measures therein to fully discharge those constitutional duties."

Louisiana v. Texas, 176 U. S. 1, was a case where Louisiana complained that the quarantine laws of Texas were so enforced as to be an embargo on interstate commerce into Louisiana. This right was denied because the bill did not show that the state of Texas had authorized the acts complained of, nor had Louisiana any duty as to the protection of interstate commerce.

The State, as *parens patriae*, may protect its water for agricultural use though it have no proprietary interest:

Kansas v. Colorado, 185 U. S. 125, 141, 142.

Its forests from destruction from gases:

Georgia v. Tennessee Copper Co., 206 U. S. 230, 238.

Its running water from being diverted into another State:

Hudson Co. Water Co. v. McCarter, 209 U. S. 349, 355.

## Whether Remedies of State are in Equity

Respondents say that if the state has any remedy it is by quo warranto, or mandamus. They cite In re Sawyer, 124 U. S. 200. That was a case where by injunction one sought to prevent a city council from

removing him from his office of police judge for malfeasance.

Also they cite Missouri Pac. Ry. Co. vs. U. S., 189 U. S. 274. That was a case where the right to bring the suit was not rested upon the threatened and continued violation of a property right given by the common law or a statute, but expressly rested upon a request for the suit by the Interstate Commerce Commission prior to its statutory authority to make such request.

The invasion of the rights of the state are threefold. First, an excessive charge for the transportation of internal commerce; second, the abuse of a grant made by the United States for the benefit of the State to such an extent as to render the grant forfeitable; third, by an unauthorized corporation.

The authorities are clear that if the remedies at law are not adequate, that the complainant will not be forced to resort to them, but if any of the relief sought is of an equitable nature, that equity will take jurisdiction of the whole matter and grant full relief.

The same contention made by the respondents here was made by the respondents in the case of the United States vs. Union Pacific Railroad Company et al, 160 U. S. 1.

The opinion of the court discussing this phase of the question by Mr. Justice Harlan will be found at page 50 and following. In that case the United States was allowed to resort to equity because in addition to the remedy of compelling the performance

of the public duty which might have been sought by mandamus, the government also desired to cancel certain contracts.

In this case not only is the public duty of complying with the law sought, but a cancellation of the grant is sought and a cancellation of the respondent's right to do internal business in the State of Oklahoma.

Under the authorities there is no doubt that where a corporation, which has public duties to perform as distinguished from a purely private corporation, threatens to commit acts *ultra vires* to the injury of the public generally, the attorney general, whether it be of England, of the United States, or of the state, the solicitor or attorney of a city of the municipality affected, has the right by equitable injunction to prevent such abuse of its corporate rights.

The Attorney General vs. Great Northern Railway Company, 62 Eng. Reports, Reprint, 337, S. C. 29 L. J. Ch. 794; 6 Jur. (N. S.) 1006, 8 W. R. 556, it was said by the Vice Chancellor:

> "Wherever the interests of the public are damnified by a company established for any particular purpose by act of Parliament acting illegally and in contravention of the powers conferred upon it, I conceive it is the function and duty of the Attorney General to protect the interests of the public by an information; and that where, in the case of an injury to private interests, it would be competent for an individual to apply for an injunction to restrain a company from using its powers for purposes not warranted by the act creating it, it is competent for the

Attorney General in cases of injury to public interests from such a cause, to file an information for an injunction."

And then the court likens it to an injunction to abate a nuisance.

See Attorney General vs. Delaware R. Co. 27 N. J. Eq. 631;

Muncie Nat. Gas. Co. vs. City of Muncie (Ind.) 60 L. R. A. 822;

Gas Light Company vs. Zanesville, 47 Oh. St. 35;

Attorney General vs. Jamaica Pond, etc., 123 Mass. 361;

Attorney General vs. Chicago Railroad Company, 35 Wis. 425.

This is also recognized by the text writers,

Thompson, Private Corporations, 2nd Ed. Secs. 5680 and 5721.

In the Federal Courts the right to resort to equity to prevent an excessive charge as existing at the common law, was definitely affirmed in Tift et al vs. Southern Railway Co.,1 23 Fed.789, at 794. (The question of whether resort should first be had to the Corporation Commission of the State will be treated later).

In the state courts the right by injunction to prevent the exacting of unlawful and excessive rates was directly affirmed in State vs. Pacific Express Co. (Neb.) 115 N. W. 619, and cases cited, and

City of Madison et al, vs. Madison Gas & Electric Co. et al, (Wis.) 108 N. W 65. and cases cited.

The authority of the Abilene Cotton Oil Co., 204 U. S. 426; Southern Railroad vs. Tift, 206 U. S. 428, B. & O. vs. United States, ex rel, 215 U. S. 481, do not control this case because the Corporation Commission of the State of Oklahoma under Section 18, Article 9 of the Constitution of the State are only authorized to prescribe such rules, regulations and classifications as may be just and reasonable. They have no affair with the question of the legality except as the same is produced by reasonableness and justness. The Interstate Commerce Commission has directly decided this question in Haines vs. C. R. I. & P. R. R. Co., 13 I. C. R. 214, Jones vs. St. L. & F. R. R. Co., 12 I. C. R. 168, Enterprise Manufacturing Co. vs. Georgia Railroad Co., 12 I. C. R. 248.

Upon the last page of the respondent's brief he suggests that instead of filing this bill in this court the matter should have been presented to the Corporation Commission of the State. When the similar question was presented to the Interstate Commerce Commission they said in the Haines case, supra:

> "The Interstate Commerce Commission is a creature of statute, and its authority is derived from the act of Congress creating the Commission and the various amendments thereto. Its function is to administer the act to regulate commerce; not to enforce conditions found in Federal or other charters. And while a violation of the conditions of the acts of Congress granting the rights of way may be ground for forfeiture, the remedy would be through the courts, * * * * As it is not the province of this Commission to

enforce compliance with conditions subsequent found in railroad charters."

It will be noted that the Commission speaks of the act as a condition subsequent. The same thing was said of it by Pollock, District Judge.

In the case of W. C. Allen, Plaintiff, vs. C. R. I. & P. Ry. Co., decided by Pollock, District Judge in the United States Circuit Court for the Eastern District of Oklahoma, at McAlester, Oklahoma, in June, 1908, was a case where Allen for want of a ticket had been charged more than three cents a mile. In his decision Judge Pollock said:

> "Of course, your case in its last analysis comes down to the question whether the defendant company either charged more than it had agreed to charge, and you, not paying it, were ejected from the train; or, that it charged more than it reasonably could charge, and you, having the right of applying to a common carrier to be transported for a reasonable charge were ejected for failure to pay. * * * * *"

After referring to Statutes fixing the rate of charge, and discussing the question of whether a contract could be made for transportation different from that fixed by the statute, Judge Pollock further said:

> "Of course, I think, I can see a difference in principle between this case and one arising under such statutes, in this. *There can be no question, I think, under the decisions but that the act of Congress here granted a franchise or right to perform a public service to the grantor of this present defendant company, on conditions; the*

*conditions of the grant being violated, the government reserves the express right of forfeiting the franchise."*

Judge Pollock was speaking of the act granting right-of-way to the Chicago, Rock Island & Pacific Railway Company, (25 Stat. at Large, 35-37) which was in all respects analogous and in formal matters exactly the same as the act granting right-of-way to the predecessor of the Santa Fe.

Judge Pollock in the Allen case says that the government can forfeit the franchise, because the case upon which he was then passing occurred in the Indian Territory before statehood.

## Can the State Ask for a Cancellation of the Grant?

*The Successor of the Grantor has that Right.*

In Schulenberg vs. Harriman, 21 Wall. 44, this court held that no one can take advantage of the nonperformance of a condition subsequently annexed to an estate in fee by the grantor or his heirs or successors. Here it is claimed that the State of Oklahoma is the successor to the United States.

*When a Territory Becomes a State What Rights it May Forfeit.*

In R. R. Co. vs. Baldwin, 103 U. S. 431, it was intimated that after a territory became a state that the state could refuse a recognition of the previously granted rights if they were such matters as the state

could have repudiated, provided the grant had come from itself alone in the first instance.

*If the United States might have Forfeited the Right before Statehood, That Power Belongs to the State now.*

The case of R. R. Co. vs. Baldwin, 103 U. S. 431 was cited to this effect by this court afterwards in the case of Van Wick vs. Knevals, 106 U. S. 396. It would seem to establish that if the United States could have brought an action to have declared a forfeiture for failure of conditions subsequent, that as the action of the United States in making the grant was only anticipatory of the state, that, therefore, the state, when it became such, would be able to bring an action to forfeit the grant, which grant was for a public interest.

## Grants in the Territory Purchased from France made for a Public Purpose Created Trust for the Public.

In the case of New Orleans vs. United States, 10 Peters 662, that portion of the facts which were analagous to those of this case were as follows:

Between the city of New Orleans and the river were vacant commons. The United States claimed that these passed to it by virtue of the cession from Spain to France and from France to the Federal Union. The City of New Orleans showed that there had always existed a trust in these vacant lands for the use of the public. Mr. Justice McLean says:

"We come now to inquire whether any in-

terest in the vacant space in contest, passed to the United States under the treaty of cession. In the second article of the treaty, 'all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices, which are not private property,' were ceded. And it is contended, as the language of this article clearly includes the ground in controversy, whether it be considered a public square or vacant land, the entire right of the sovereign of Spain passed to the United States.

"The government of the United States, as was well observed in the argument, is one of limited powers. It can exercise authority over no subjects, except those which have been delegated to it. Congress cannot, by legislation, enlarge the federal jurisdiction, nor can it be enlarged under the treaty-making power. If the common in contest, under the Spanish crown, formed a part of the public domain or the crown lands, and the king had power to alien it, as other lands, there can be no doubt, that it passed under the treaty to the United States, and they have a right to dispose of it, the same as other public lands. But if the king of Spain held the land in trust, for the use of the city, or only possessed a limited jurisdiction over it, principally, if not exclusively, for police purposes, was this right passed to the United States under the treaty? That this common, having been dedicated to public use, was withdrawn from commerce, and from the power the king rightfully to alien it, has already been shown."

It is our theory that the Act of the United States in granting these lands to the Southern Kansas Railway for right-of-way, dedicated it for a public pur-

pose, and that the public interest of the community thus has a trust created in the land for its benefit, and that, therefore, the lands are no longer like other public lands of the United States; that the primary disposal thereof has been made and that the statute is in all respects as it was in the New Orleans case.

So in that case Mr. Justice McLean said:

> "The State of Louisiana was admitted into the Union, on the same footing as the original states. Her rights of sovereignty are the same, and by consequence, no jurisdiction of the federal government, either for purposes of police or otherwise, can be exercised over this public ground which is not common to the United States. It belongs to the local authority to enforce the trust, and prevent what they shall deem a violation of it by the city authorities. All powers which properly appertain to sovereignty, which have not been delegated to the federal government, belong to the states and the people."

Will it not follow from this that where in Oklahoma it belongs to the local authorities to enforce the trust created by the granting of the lands to the predecessors of the Santa Fe and because of the continuous violation by the defendant of the terms of the grant, forever prevent further infraction of the rights of the public by taking from the defendant its property interest in the real estate.

The case of New Orleans vs. United States, supra, was decided in 1834. This decision was at the time conceived to have the meaning we have sought to give it.

The Supreme Court of Missouri, in 6 Mo. 524, in the year 1840 uses this language with reference to where the King has granted a part of the local domain for public purposes. In the opinion Mr. Justice Napton said:

> "It seems to have been the custom with the kings of France and Spain, to grant to towns and villages a portion of land contiguous thereto, as a common, for a supply of fuel to the commoners, and to furnish pasturage for their cattle, and the King himself could not alienate such commons." * * * * (Citing authorities.) "A careful examination of the laws and usages of both these countries led the Supreme Court of the United States to the conclusion that these sovereigns could exercise a certain jurisdiction over these commons, and other places similarly situated, but it was purely a police regulation. New Orleans v. United States, 10 Peters, 7. Indeed, what kind of proprietary interest can we imagine, existing in the crown which is inalienable? The very terms of an absolute dominion imply the power of alienation. The dominion retained by the King of Spain, then, was not proprietary, but purely political—a dominion never severed from the sovereignty of our country, and nowise inconsistent with the absolute ownership of a subject."

From this it would follow that where a trust has been created for the benefit of the public that the state and not the United States must enforce the trust.

Likewise in Mayor, etc., of Mobile vs. Eslava, 9 Porter (Ala.) 577, at page 602, the Supreme Court of Alabama, referring to the New Orleans case, said:

> "In New Orleans vs. The United States, the

court were of the opinion, that though the property in dispute was dedicated to the public use, so that the King had not the power rightfully to alien it; yet he had a limited power over it for certain purposes. But they say the treaty by which Louisiana was ceded to the United States *could not*, and the constitution *did not*, transfer to the Federal government the right to exercise the power which, previous to the treaty, was vested in the King."

And, therefore, the Alabama court concludes that such power belongs in the State. That decision was rendered also in 1840.

In 1855 the Supreme Court of Massachusetts, in the case of Dunham v. Lamphere, 3 Gray 268, touches upon the same question and says:

"It was considered and determined, on what we then conceived and still believe to be ample authority, that whatever right of dominion and sovereignty on this subject remained in the crown, whilst these states were colonies and provinces of Great Britain, and owed allegiance to the king, no right either of property or dominion remained after the acknowledgment of our independence by a treaty, sanctioned as it was by act of parliament. And we further determined that the dominion and controlling power over the sea-coasts,its shores and tide waters, thus absolutely renounced and relinquished by the government of Great Britain, in which must vest somewhere, did, as between the United States and the several States respectively, fully and absolutely vest in the several states. This had been definitely settled by the supreme court of the United States. New Orleans v. United Stat-

es, 10 Pet. 662. Pollard v. Hagan, 3 How. 212." The court in that case therefore held:

> "That the right to the fisheries, and the power to regulate the use of the fisheries on the coasts and in the tide waters of the State, are left, in the distribution of powers between the general and state governments, with the states, subject only to such powers as Congress may justly exercise in the regulation of commerce, foreign and domestic. That the exercise of both of these are not inconsistent, and therefore are not in conflict with each other, was also settled by the Supreme court of the United States, in the case of Wilson v. Blackbird Creek Marsh Co. 2 Pet. 245."

Transportation being thus both interstate and intrastate in so far as the grant made to the Southern Kansas Railway Company by the United States clearly covered intrastate, it is the duty and the right of the State of Oklahoma to protect that right and not of the United States. The United States is given the control of the commerce interstate, and may exercise this power by such a suit as this because of breaches committed in interstate business, but its action or lack of action cannot affect the authority of the State of Oklahoma. The authority of the State of Oklahoma started on the 16th day of November, 1907, and therefore has been exercised with proper expedition.

The Supreme Court of California in 1860 in the case of Hart v. Burnett et al., 15 Calif. 530, held that the City of San Francisco, at the date of the cession of California, possessed a municipal authority over the land within the city. That such lands were

held in trust for the use of the city. That these trusts were public and municipal in their nature and were within the control and supervision of the state sovereignty and not the federal government.

In the opinion Judge Baldwin, Chief Justice Field concurring, said:

> "If such lands had been granted, assigned, or dedicated to the public of San Francisco, or if the people of that municipality had acquired an interest or use in such lands under the Mexican government, they were withdrawn from commerce, and Mexico could not have transferred to the United States any title, under and by virtue of which the latter could change such uses, except, possibly, by an exercise of the right of eminent domain. And as held by the Supreme Court in the case of The City of New Orleans v. The United States, no right to regulate such uses could be acquired by the Federal Government, that right being, by the constitution, given to the State of California and the people. Congress, therefore, could not change the trust under which San Francisco held these lands, nor could it destroy, or in any way modify, the uses to which they had been dedicated. Such power could be exercised only by the State sovereignty."

## Grant Made for a Public Purpose.

An act granting right of way has already been held by this court to have been for the purpose of creating a permanent highway.

Cherokee Nation vs. Southern Kansas Railway 135 U. S. 641.

In that case the court said:

> "The question is no longer an open one as to whether the railroad is a public highway established primarily for the convenience of the people and to subserve public ends, and, therefore, subject to governmental control and regulation. It is because it is a public highway and subject to such control that the corporation by which it is constructed, and by which it is to be maintained, may be permitted under legislative sanction, to appropriate private property for the purposes of a right of way."

It may be added that it is only because of its public purpose that it was capable of taking a grant of land without pecuniary consideration.

## The United States before Statehood might have Declared a Forfeiture either by Legislative Action or Judicial Proceedings.

In United States vs. Repentigny, 5 Wall. 211, at page 267, this court held that the United States succeeded to all the rights in the Northwest territory that existed in the King of France under the treaty of 1783 with Great Britain at the close of the revolution. That the United States became the owner paramount of this seigniory, and that in order to create a forfeiture or a reunion with the public domain, there should be a judicial inquiry, or what in the technical language of the common law was called office found, or its legal equivalent. That the legislative act directing the possession and appropriation of the land would be the equivalent of office found.

Utah, N. & C. R. Co. vs. Utah & C. Ry. Co.,
110 Fed. 879.

P. 890. "There are numerous cases where, upon the particular facts thereof, it has been held that, a statute creating a corporation which declares that unless the corporations perform certain acts within the prescribed time its corporate existence and powers shall cease, or its powers and franchises shall terminate, such statute executes itself. But the fact is that this question is always made dependent upon the special facts, the character of the corporation, and the legal construction to be given to the particular statute. The general rule is that the question whether a railroad corporation authorized by the state has forfeited its corporate rights and franchises cannot be raised in any collateral proceedings, and can only be taken advantage of by the sovereign power which created the corporation, because it is its privilege alone to question the right of the corporation to act under its franchise. The state may waive the conditions, or enforce them, if it sees fit to do so. When the continued life of the corporation is made by the charter or governing statute to depend upon the performance of a condition subsequent, the non-performance of the condition is not an ipso facto forfeiture, but is a mere ground of forfeiture, of which the state can avail itself, or which it can waive at its pleasure. So that, unless the state takes advantage of the ground of forfeiture, in a proceeding by quo warranto, or otherwise, to oust the corporation of its franchise, the existence of the corporation cannot, upon such a ground, be collaterally called in question. The supreme court of the United States has uniformly held, in construing various

acts of congress containing similar provisions to the act of 1875, that the failure to complete the road within the time limited is treated as a condition subsequent, not operating ipso facto as a revocation of the grant, but as authorizing the government itself to take advantage of it, and forfeit the grant by judicial proceedings, or by an act of congress resuming title to the lands. Schulenberg v. Harriman, 21 Wall. 44, 62, 22 L. Ed. 551; Van Wyck v. Knevals, 106 U. S. 360, 368, 1 Sup. Ct. 336, 27 L. Ed. 201; Railroad Co. v McGee, 115 U. S. 469, 473, 6 Sup. Ct. 123, 29 L. Ed. 446, and authorities there cited; Bybee v. Railroad Co., 139 U. S. 663, 674, 11 Sup. Ct. 641, 35 L. Ed. 305, and authorities there cited; Railroad Co. v. Mingus, 165 U. S. 413,431 , 17 Sup. Ct. 348, 41 L. Ed. 770; U. S. v. Northern Pac. R. Co., 177 U. S. 435, 20 Sup. Ct. 706, 44 L. Ed. 836."

*Capacity of the United States a Trustee over the Territory.*

In Hinman et al vs. Warren, 6 Ore. 409, it was held that in matters touching the sovereignty of the future state, the general government in a territory is simply a protector thereof until such time as the territory becomes a state.

The matter is discussed at length in Pollard's Lessee vs. Hagan, et al, 44 U. S. 212 and following. As we understand it that case decided that the United States exercised the power over the Territory anticipatory of and as a guardian for the State; that it has the primary disposal of public lands but that when they are once disposed of that the municipal authority of the United States is forever termined and such

states then become equal with the older states. The following excerpts from that opinion tend to sustain that view as we understand it:

Pollard's Lessee vs. Hagan et al, 44 U. S. 212,

p. 220. "That the people of Alabama for ever disclaimed all right on title to the waste or unappropriated lands lying within the state, and that the same should remain at the sole disposal of the United States; and that all the navigable waters within the state should forever remain public highways, and free to the citizens of that state and the United States, without any tax, duty, or impost, or toll therefor, imposed by that state * * * * * *

"We think a proper examination of this subject will show that the United States never held any municipal sovereignty, jurisdiction, or right of soil in and to the territory of which Alabama, or any of the new states were formed; except for temporary purposes, and to execute the trusts created by the acts of the Virginia and Georgia legislatures, and the deeds of cession executed by them to the United States, and the trust created by the treaty with French republic, of the 30th of April, 1803, ceding Louisiana.

"All that part of Alabama which lies between the thirty-first and thirty-fifth degree of north latitude, was ceded by the state of Georgia to the United States, by deed bearing date the 24th day of April, 1802, which is substantially, in all its principles and stipulations, like the deed of cession executed by Virginia to the United States, on the 1st day of March, 1784, by which she ceded to the United States the territory

northwest of the river Ohio. Both of these deeds of cession stipulated, that all the lands within the territory ceded, and not reserved or appropriated to other purposes, should be considered as a common fund for the use and benefit of all the United States, to be faithfully and *bona fide* disposed of for that purpose, and for no other use or purpose whatever. And the statute passed by Virginia authorizing her delegates to execute this deed, and which is recited in it, authorizes them, in behalf of the state, by a proper deed to convey to the United States, for the benefit of said states, all the right, title, and claim. as well of soil as jurisdiction, 'upon condition that the territary so ceded shall be laid out and formed into states containing a suitable extent of territory, not less than 100, nor more than 150 miles square, or as near thereto as circumstances will admit; and that the states so formed shall be republican states and admitted members of the federal union, having the same rights of sovereignty, freedom and independence, as the other states.'"

p. 221. "And in the deed of cession by Georgia it is expressively stipulated, 'That the territory thus ceded shall form a state and be admitted as such into the union as soon as it shall contain sixty thousand free inhabitants, or at an earlier period if Congress shall think it expedient, on the same conditions and restrictions. with the same privileges, and in the same manner, as is provided in the ordinance of Congress of the 13th day of July, 1787 for the government of the north-western territory of the United States, which ordinance shall in all its parts extend to the territory contained in the present act of cession, that article only excepted which forbids sla-

very.' The manner in which the new states were to be admitted into the union according to the ordinance of 1787, as expressed therein is as follows: 'And whenever any of the said states shall have sixty thousand free inhabitants therein such state shall be admitted by its delegates into the Congress of the United States, on an equal footing with the original states in all respects whatever.' Thus it appears that the stipulations, trusts, and conditions, are substantially the same in both of these deeds of cession; and the acts of Congress, and of the state legislatures in relation thereto, are founded in the same reasons of policy and interest, with this exception, however—the cession made by Virginia was before the adoption of the Constitution of the United States, and that of Georgia afterwards. Taking the legislative acts of the United States, and the states of Virginia and Georgia, and their deeds of cession to the United States, and giving to each, separately, and to all jointly, a fair interpretation, we must come to the conclusion that it was the intention of the parties to invest the United States with the eminent domain of the country ceded, both national and municipal, for the purposes of temporary government, and to hold it in trust for the performance of the stipulations and conditions expressed in the deeds of cession and the legislative acts connected with them."

p. 222: "To a correct understanding of the rights, powers, and duties of the parties to these contracts, it is necessary to enter into a more minute examination of the rights of eminent domain and the right to the public lands. When the United States accepted the cession of the territory, they took upon themselves the trust to hold

the municipal eminent domain for the new states, and to invest them with it, to the same extent in all respects that it was held by the states ceding the territories."

p. 223. "When Alabama was admitted into the union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain, which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession and the legislative acts connected with it."

p. 223. "The right of Alabama and every other new state to exercise all the powers of government, which belong to and may be exercised by the original states of the union, must be admitted, and remain unquestioned, except so far as they are, temporarily, deprived of control over the public lands."

p. 223. "We will now inquire into the nature and extent of the right of the United States to these lands, and whether that right can in any manner affect or control the decision of the case before us. This right originated in voluntary surrenders, made by several of the old states, of their waste and unappropriated lands, to the United States, under a resolution of the old Congress, of the 6th of September, 1780, recommending such surrender and cession, to aid in paying the public debt, incurred by the war of the Revolution. *The object of all the parties to these contracts of cession, was to convert the land into money for the payment of the debt, and to erect*

*new states over the territory thus ceded; and as soon as these purposes could be accomplished, the power of the United States over these lands, as property, was to cease.*

"Whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new states will be complete, throughout their respective borders, and they, and the original states, will be upon an equal footing, in all respects whatever. We therefore, think the United States hold the public lands within the new states by force of the deeds of cession, and the statutes connected with them, and not by any municipal sovereignty which it may be supposed they possess, or have reserved by compact with the new states, for that particular purpose. The provision of the Constitution above referred to shows that no such power can be exercised by the United States within a state. Such a power is not only repugnant to the Constitution, but it is inconsistent with the spirit and intention of the deeds of cession. The argument so much relied on by the counsel for the plaintiffs, that the agreement of the people inhabiting the new states, 'That they forever disclaim all right and title to the waste or unappropriated lands lying within the said territory; and that the same shall be and remain at the sole and entire disposition of the United States,' cannot operate as a contract between the parties, but is binding as a law. Full power is given to Congress 'to make all needful rules and regulations respecting the territory or other property of the United States.' This authorized the passage of all laws necessary to secure the rights of the United States to the public lands, and to provide for their sale, and to protect them from taxation."

p. 224. "The principal argument relied on against this right, is, that the United States acquired the land in controversy from the King of Spain. Although there was no direct reference to any particular treaty we presume the treaty of the 22nd of February, 1819, signed at Washington, was the one relied on, and shall so consider the argument. It was insisted that the United States had, under the treaty, succeeded to all the rights and powers of the King of Spain; and as by the laws and usages of Spain, the King had the right to grant to a subject the soil under navigable waters, that, therefore, the United States had the right to grant the land in controversy, and thereby the plaintiffs acquired a complete title.

"If it were true that the United States acquired the whole of Alabama from Spain, no such consequences would result as those contended for. It cannot be admitted that the King of Spain could, by treaty or otherwise, impart to the United States any of his royal prerogatives; and much less can it be admitted that they have capacity to receive or power to exercise them. Every nation acquiring territory, by treaty or otherwise, must hold it subject to the constitution and laws of its own government, and not according to those of the government ceding it. Yat, Law of Nations, b. l, c. 19, s. 210, 244, 245, and b. 2 c, 7 s, 80."

## Until the Primary Disposal, the Authority of the United States is all Controlling; when once Disposed of the Control of the United States is ended.

It is distinctly decided until the primary dispos-

al of the soil that no legislation of a state or territory can apply. It was so decided as to a state in Gibson v. Chouteau, 80 U. S. 13 Wallace, page 92; as to a territory in Irvine v. Marshall, 61, U. S. (20 Howard,) 558.

But it is to be noticed that this compact between the United States and the state only is applicable as to the direct guaranty as to the United States.

In David v. Rickabaugh, 32, Ia., 543, Judge Miller said:

> "While the State has an undoubted right to legislate as she may please in regard to the remedies to be prosecuted in her courts, and to regulate the disposition of property of her citizens, by descent, devise or alienation, yet in respect to the public domain of the United States, of which the land in dispute was a part, congress is invested, by the Federal constitution, with the power of disposing of and making all needful rules and regulations respecting it. Wilcox v. Jackson, 13 Pet. 498; Irvine v. Marshall, 20 How. 553. So that, in respect to the disposition of the public lands, we must be governed by the regulations established by congress touching the same, until the title has finally passed from the government, and until conveyed by its grantee."

In Farrington, v. Wilson and others, 29 Wis. 383, the court held that such a presumption must be strictly construed, and that the exemption from taxation was a personal right applying to the patentee of the Government alone.

In Nelson McCracken v. Todd, 1 Kan. 148, at

page 165, Ewing Chief Justice, says as to a treaty ceding from the Delaware to the United States certain lands,

> "From the date of the cession, these ceded lands and their occupants (not Indians) became subject to the laws of congress precisely as the other public lands in Kansas, and their occupants were subject to them, except as the treaty contained provisions of special and local application to them."

Therefore the special and local application contained in the grant to Southern Kansas does not apply to the A. T. & S. F. because it is not the patentee but the assignee of the patentee, first, and second, because in so far as it deals with internal commerce in Oklahoma it is local and special

In State v. Bachelder, 5 Minn. 223, 80 American Decisions, 410, the Court held that the interest of the United States in the lands was proprietary only, that the sovereignty was in the State and that the rights attaching to the interests of the United States did not differ from those of other land-holders in the State except in so far as the Constitution of the United States gave the United States power from which fact flowed first, the right of the United States to deal with interstate commerce as was held in the case of Shively v. Bowlby 152 U. S. 1, as to tide lands and the right of the United States to govern the Indian Nations, and the exemption of the property of the United States from taxation by the State.

In that case the Court said:

"While lands belong to United States they may be disposed of by that government to whom it pleases, and the title may be secured to the purchaser in such manner as it sees fit to prescribe, but the moment the sale is completed and the title secured to the purchaser, the land enters into the general mass of the property of the state, relieved from all control of the federal government whatever, save such as is incident to the general relation of the state to the federal Union."

p. 48. "As has been seen, by the law of England, the title in fee, or *jus privatum*, of the King or his grantee was, in the phrase of Lord Hale, 'charged with and subject to that *jus publicum* which belongs to the King's subject,' or as he elsewhere puts it, 'is clothed and superinduced with a *jus publicum*, wherein both natives and foreigners in peace with this kingdom are interested by reason of common commerce, trade and intercourse.' Hargrave's Law Tracts, 36, 84. In the words of Chief Justice Taney, 'the country' discovered and settled by Englishmen 'was held by the King in his public and regal character as the representative of the nation, and in trust for them;' and the title and the dominion of the tide waters and of the soil under them, in each colony, passed by the royal charter to the grantees as 'a trust for the common use of the new community about to be established;' and, upon the American Revolution, vested absolutely in the people of each State 'for their own common use, subject only to the rights since surrendered by the Constitution to the general government.' Martin v. Wadell, 16 Pet. 367, 409-411. As ob-

served by Mr. Justice Curtis, 'This soil is held by the State, not only subject to, but in some sense in trust for, the enjoyment of certan public rights.' Smith v. Maryland, 18 How. 71, 74. The title to the shore and lands under tide water, said Mr. Justice Bradley. 'is regarded as incidental to the sovereignty of the State—a portion of the royalties belonging thereto, and held in trust, for the public purposes of navigation and fishery. Hardin v. Jordan, 140 U. S. 371 381. And the Territories acquired by Congress, whether by deed of cession from the original States, or by treaty with a foreign country, are held with the object, as soon as their population and condition justify it, of being admitted into the Union as States, upon an equal footing with the original States in all respects; and the title and dominion of the tide waters and the lands under them are held by the United States for the benefit of the whole people, and as this court has often said, in cases above cited, 'in trust for the future States.' Pollard v. Hagan, 3 How. 212, 221, 222; Weber v. Harbor Commissioners, 18 Wall. 57, 65; Knight v. United States Land Association, 142 U. S. 161, 183.

## The very Disclaimer of Control over Public Lands Asserts Control after the Title shall have been Extinguished in the United States

The disclaimer, the constitution of the State of Oklahoma, is as follows:

Section 3, Article 1.

"Sec. 3. Public lands—disclaimer of juris-

diction over Indians—taxation.—The people inhabiting the state do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States."

## Since Statehood has the United States had any Authority to Cancel the Grant

From the time of the case of New Orleans vs. United States, 10 Peter 662, down to this time as shown in United States vs. Illinois Central, 154 U. S. 225, at 239.

> "The United States has no power to regulate within a state the execution of trusts or uses created for the benefit of the public and the jurisdiction in such cases is with the state or its subordinate agencies."

## Before Statehood United States had both Municipal and Federal Power in the Territory

This is too well established to need citation.

## After Statehood the United States has no Authority over Internal Commerce

This court has already decided that the govern-

ment of the United States through congress or otherwise has no control over the internal commerce of a state except as some law effecting the same may violate a law of the United States. The Internal commerce of the state is as solely within the control of the State as the interstate commerce is within that of the United States. The completely internal commerce of a state, then, may be considered as reserved for the state itself.

Gibson vs Ogden, 9 Wheaton 195, per Chief Justice Marshall;

Louisville N. & O. T. Rr. Co. vs Miss., 133 U. S. 587;

Geer vs Conn., 161 U. S. 519;

Sands vs Manistee River Imp. Co., 123 U. S. 288;

Covington Bridge Co. vs Kentucky, 154 U. S. 204.

From this it is deducible that the United States cannot forfeit the grant because conditions subsequent have been violated in so far as internal commerce is concerned. As the State of Oklahoma, under the authority of Louisiana vs Texas, 176 U. S. 1, has no duty cast upon it to protect interstate commerce, the only interest of the state must be the violation of the agreement as to internal commerce in the State of Oklahoma.

**Where Breach is a Duty asto Internal Commerce of a State the United States cannot assert Forfeiture**

United States v. So. Pac. R. R., 146 U. S. 570 is

referred to by respondent as supporting the view that in this case only the United States could forfeit for breach of condition.

We confess that such is the rule prior to the primary disposal of the title. Until final disposition is once made the federal government alone can forfeit. This view was recognized in that case.

Also before statehood the United States alone might forfeit or exercise any powers of sovereignty. But after statehood the United States could exercise no control over internal commerce. Gibson vs. Ogden, 9 Wheat. 195, supra.

And has no power to regulate within a state the execution of trusts or uses created for the benefit of the public. United States vs. Ill. Cen., 154 U. S. 279, supra.

And after the primary disposal (that is where no fraud intervenes and the title rests) the property enters the general mass of property in the state relieved from all control by the federal government. Shively vs. Bowlby, 152 U. S. 1.

As to United States vs. Northern Pac. Ry. Co., 177 U. S. 441, what was said of United States vs. Southern Pac. R. R., supra, can be said of it. But in the latter case it was said that breach of condition subsequent did not *ipso facto* work a forfeiture which an individual might avail of, and no question was made as to whether a state might avail itself of a breach of that part of the condition

which was made to protect a legislative domain over which the state alone had jurisdiction.

It is clear that as to internal commerce neither the United States nor individuals may assert a forfeiture. Such an assertion is preeminently a duty and right adhering to statehood.

## In view of the fact that the right of way is granted to the carrier out of land held in trust by the United States for the state the primary duty of the carrier is to the local transportation

If any contest arises as to whether the control of the United States over interstate commerce or the control of the state over state commerce, was the main important factor of the grant, it will be borne in mind that the primary and first duty of a road is to the domestic state commerce. It is not contended that if state legislation and national legislation come in conflict that that part of the state must not subserve. The contrary is admitted. But what is meant is that the primary duty of a railroad is to subserve the local interests. Because a forfeiture of the right of way, or the right to do business by the state would in no wise interfere with the public duty of the road to continue the transportation, both of the state and interstate business. The control of the United States is over the transportation not over the question of what corporation is operating the road or who shall be the owner thereof.

There is a great distinction between transportation and the management of the company that conducts the transportation.

C. M. Ry Co. vs. Solan, 169 U. S. 137.

Mr. Justice Gray speaking for this court said:

> "It is equally within the power of the state to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries, which, after they have been inflicted, the state has power to redress and punish. The rules prescribed for the construction of railroads, *and for their management and operation*, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law."

The same principle was approved in the later case of Richmond Co. vs. Tobacco Co., 169 U. S. 311.

In Lake Shore & Mich. South. Railway v. Ohio, 173 U. S. 285, at 301, Mr. Justice Harlan, said:

> "Certainly, the State of Ohio did not endow the plaintiff in error (a railroad corporation) with the rights of a corporation for the purpose simply of subserving the convenience of passengers traveling through the State between points outside of its territory."

* * * * * * * * * *

> "In the construction and maintenance of such a highway under public sanction the corporation really performs a function of the State. Smyth v. Ames, 169 U. S. 466, 544."

To disregard the rights of the state was carefully considered by the court in the Lake Shore case and this court said, that in the absence of congressional legislation,

> "It was for the State to take into consideration all the circumstances affecting passenger travel within its limits, and as far as practicable make such regulations as were just to all who might pass over the road in question. It was entitled of course to provide for the convenience of persons desiring to travel from one point to another in the State on domestic trains. But was not bound to ignore the convenience of those whose desire to travel from places in the State to places beyond its limits, or the convenience of those outside of the State who wished to come into it. Its statue is in aid of interstate commerce of that character. It was not compelled to look only to the convenience of those who desired to pass through the State withoout stopping. Any other view of the relations between the State and the corporation created by it would mean that the directors of the corporation could manage its affairs solely with reference to the interests of stockholders and without taking into consideration the interests of the general public. It would mean not only that such directors were the exclusive judges of the manner in which the corporation should discharge the duties imposed upon it in the interest of the public, but that the corporation could so regulate the running of its interestate trains as to build up cities and towns at the ends of its line or at favored points, and by that means destroy or retard the growth and prosperity of those at intervening points."

The court finally says as to this legislation:

> "It has not unreasonably obstructed the freedom of commerce among the States. Its regulations apply equally to domestic and interstate railroads. Its statute is not directed against interstate commerce, but only incidentally affects it. It has only forbidden one of its own corporations from discri minating unjustly against a large part of the public, *for whose convenienct that corporation was created and invested with authority to maintain a public highway within the limits of the State.*"

In the later case of Cleveland etc. Railroad Co., vs Illinois, 177 U. S. at page 521, Mr. Justice Brown said as to Lake Shore case:

> "While, as we held in the Lake Shore case, railways are bound to provide primarily and adequately for the accomodation of those to whom they are directly tributary, and who not only have granted to them their franchise but who may have contributed largely to the construction of the road."

## Grant is now an Act of the State.

The Act of July 4, 1884, (Chap. 179, Vol. 23, U. St. at L. page 73 it says) granted right of way to the Southern Kansas Railway Company. It was a law of the United States which operated differently in Oklahoma Territory and Indian Territory (before Statehood) than elsewhere in the United States. It was a local law of these territories enacted under the control of Congress over territories. Therefore upon Statehood,it being a law in force in the Territory of Okla-

homa, and not being inconsistant with the Constitution of that State, nor amended nor modified, became and now is a local law of the State.

Section 2 of the Schedule of the Constitution provides:

> "Sec. 2. All laws in force in the Territory of Oklahoma at the time of the admission of the State into the Union, which are not repugnant to this Constitution, and which are not locally inapplicable, shall be extended to and remain in force in the state of Oklahoma, until they expire of their own limitation or are altered or repealed by law."
>
> This had the effect of re-enacting by reference as an Oklahoma Statute, all the provisions of Chap. 179, Vol. 23, which are not within the exception stated.

Also, the Congress agreed to this, so far as their consent was necessary or useful.

Act of June 16, 1906. (The Oklahoma enabling Act) Section 21, provides:

> " * * And all laws in force in the Territory of Oklahoma at the time of the admission of said State into the Union, shall be in force throughout said State, except as modified or changed by this Act or by the Constitution of the State, and the laws of the United States not locally inapplicable shall have the same force and effect within said state as elsewhere within the United States."

This recognizes three classes of laws, (a) inapplicable laws of the United States, for instance, those providing for the government of the Territory of Ok-

lahoma. (these are in effect repealed), (b) general laws of the United States applicable to the state to be as elsewhere in the Union; and (c) all local laws especially in force in Oklahoma Territory, whether territorial or federal, to be extended in force throughout the state, except they be repugnant to the Enabling Act or to the Constitution of Oklahoma.

Nothing in the Act granting right of way is modified or affected by the Enabling Act, (except this provision putting it in force in the State locally). Nor are its provisions in any way changed or modified by the Constitution.

The Act after granting right of way provided in Section 4 as follows:

> "That said railroad company shall not charge the inhabitants of said territory a greater rate of freight than the rate authorized by the laws of the State of Kansas for services or transportation of the same kind; Provided; that passenger rates on said railway shall not exceed three cents per mile. Congress hereby reserves the right to regulate the charges for freight and passengers on said railway and messages on said telegraph and telephone lines until a state government or governments shall exist in said Territory, within the limits of which said railway or a part thereof shall be located; and then such state government or governments shall be authorized to fix and regulate the cost of transportation of persons and freights within their respective limits by said railway; but Congress expressly reserves the right to fix and regulate at all times the cost of such transportation by said railway or said com-

pany whenever such transportation shall extend from one state into another, or shall extend into more than one state; Provided, however That the rate of such transportation of passengers, local or interstate, shall not exceed the rate above expressed, And provided further, That said railway company shall carry the mail at such prices as Congress may by law provide; and until such rate is fixed by law the Postmaster-General may fix the rate of compensation."

Let us analyse its provisions:

(a). That a greater rate of freight than that authorized by the laws of Kansas, for services or transportation of the same kind, shall not be charged to the inhabitants of said Territory.

(b). Next there is a proviso that passenger rates shall not exceed three cents per mile.

Why to these inhabitants only? Because at the time of the passage of the Act of 1884 no one else was allowed in that domain. Section 2134, Rev. Stat. U. S. This continued to be the law until Act of March 2, 1889.

A protection to the "inhabitants" protected all who could lawfully use the road as passengers or shippers. Those who traveled or shipped through without stops were of course unaffected.

These conditions continued until the gradual opening up of the Indian Territory and Oklahoma Territory.

When the settlers came into Oklahoma they brought the common law with them.

McKennon v. Winn, 1 Okla. 327.

This carried the right of the Attorney General to enjoin the exaction of illegal rates. Since statehood under Section 2 of the Schedule, of the Constitution of Oklahoma this right now exists in the whole people of the State.

As to what was meant by the prohibition against greater rates than those authorized by Kansas appears from the other legislation adopted about the same time.

So far as I have been able to find, the first attempt of Congress in granting right of way, to stipulate what should be the maximum amount charged, was contained in statutes of 1865, Vol. 12, Statutes at Large, page 774, which provided that the price for carrying the United States mail over the lines therein granted right of way, and also therein given a grant of land, should be fixed by Congress, and until so fixed, should be fixed by the Postmaster General.

Following this in the statutes of the 38th Congress, Vol. 13, Statutes at Large, p. 344, is a provision that the railroad therein granted right of way should be a public highway and should transfer government troops free.

For a long time the legislation of Congress, however, shows no attempt to specifically, either fix the rates or fix the maximum charge. But on the 2nd of August, 1882, in the grant of right of way to the St. L. & S. F. R. R. Co. to build through a portion of the then Indian Territory, will be found the first attempt

of Congress to directly fix the maximum rate. It is contained in the 22nd Vol. of Statutes at large, page 182. That portion of it, important to a consideration of this case, is as follows:

> Sec. 7. "That no greater rate of fare or freight shall be charged in the Choctaw or Chickasaw Nations by such railroad company than the lowest rate authorized by law in the States of Arkansas and Texas, or either of them, for service or business of the same kind."

This statute is, so far as I know, the first echo in the proceedings of Congress of the "Granger" movement, which even before this time had become a well known phenomenon of the legislation of the States of the middle west.

In his book on American Railroad Rights, Judge Walter C. Noyes, at page 214, in speaking of American railroads, says:

> "In our examination of underlying principles, we saw that the State in granting early railroad charters—following the old canal acts—often prescribed tolls to be collected for the use of the road, as well as charges for the transportation service. While this distinction was not long observed, and the rate was treated as covering both the toll and the charge—nearly all charters contained some provisions concerning rates. Generally maximum rates were prescribed leaving to the railroad the right to fix the exact rates within the stated limits."

And on page 215:

> "these charter maxima—as is indicated by

these illustrations—were usually so far above what the railroad could ever expect to charge as to have no effect upon the real rate.

"But while maximum rates were sometimes prescribed, most charters empowered the railroads to make such rates as they saw fit. The policy of a majority of the States, as shown both in their charters and general laws has always been to let rates alone.
* * * * *

"General laws were passed at an early date in several states prescribing maximum rates, and these provisions have, as a rule, continued upon the statute books. But, like the charter maxima, they were generally fixed so high as to constitute no real limitation of the actual charge."

And at page 216:

"Many of the statutes relating to railroad charges, and especially those providing for commissions with mandatory power over rates, are a result of the 'Granger' movement which took place in the States of the Middle West between 1870 and 1877."

The attempt of Congress, as contained in Sec. 7 of the law, 22, Statutes, 182, granting right of way to the St. L. & S. F. R. R. Co., to limit rates is simply an echo in that body of the "Granger" movement in the Middle West, and therefore, Munn vs. Ill. 94 U. S. 113, the first case upholding the "Granger" movement is illuminating as showing the interpretation to be put upon the statute, and the complainant in his action contends that in fixing the maximum charge-

able at the lowest rate authorized by law in the States of Arkansas or Texas, or either of them, that Congress meant to say that this limit, or the limit prescribed in either of those states was the limit of a reasonable charge, and that any rate in the Indian Territory greater than those rates in the state would be unreasonable.

In Munn vs. Ill. the question was the power of the State of Illinois to fix a minimum rate chargeable for the storing and elevating of grain in the ware houses in the city of Chicago, and the court after upholding the statute upon the ground that at common law a person in a public employment could only charge a reasonable sum for his services, says:

> "In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable."

The reason for the statute becomes apparent when the other statutes in *pari materia* are considered.

For that St. L. & S. F. R. R. Co. branch authorized to be built from Sapulpa southward to Texas found in Vol. 29 of the Statutes at Large, pages 80 to 82, by Sec. 4, the road is prohibited from charging the inhabitants of the Territory of Oklahoma a greater rate of freight than the rate authorized by the laws of the State of Kansas for service of the same kind.

The building of the branch from Rogers, Arkan-

sas, to Grove, Indian Territory, and from Fayetteville, Ark. to Okmulgee, Ind. Ter., 26 Statutes at Large, page 844, the road was prohibited from charging a greater rate of freight than that authorized by the State of Arkansas.

For building the road from Baxter Springs, Kansas to Carthage, Missouri, Vol. 29 of the Statutes at Large, page 87, that road was put under the Arkansas rate.

For the road from Baxter Springs, Kansas to Afton, Ind. Ter. Vol. 24, of the Statutes at Large, page 124, the Arkansas rate.

For the building the branch from Hope, Arkansas, to what was intended to be Atoka, but what has turned out to be Sugden, now Oklahoma, the Arkansas rate was put as the maximum.

Likewise the Fort Smith & Western is limited by 29th Statutes at Large, page 41, to the Arkansas rate.

The Chicago, Rock Island & Pacific Railway Company, under the right of way granted to the Chicago, Kansas and Nebraska Railroad Company, 26 Statutes at Large, 493, is limited to the Kansas rate; the Kansas City Southern, Vol. 27, Statutes at Large, page 288, is limited to the Arkansas rate;

The Santa Fe, on that portion going from the north to Purcell is limited by the right of way granted to the Southern Kansas Railroad Company, Vol. 23, Statutes at Large, page 74, to the Kansas rate, and on that section of the road from Texas north to Pur-

cell, granted under the name of the Gulf, Colorado and Santa Fe, contained in Vol. 23, Statutes at Large, page 71, to the Texas rate.

Likewise the right of way from Dallas to Chickasha granted to a railroad in the 27th Statutes at Large, page 492, was limited to the Kansas rate because the right of way was granted as proceeding south from Chickasha and to the Denison & Northern Railroad Company, Vol. 27, Statutes at Large, page 336, to the Texas rate.

Gainesville, McAlester & St. Louis, Vol. 27, page 525, to the Texas rate; Gainesville, Oklahoma & Gulf, Railroad, Vol. 27, page 475, to the Texas rate.

While if we examine those roads coming in from the north in addition to the Santa Fe and St. Louis & San Francisco Railroad Company, we find Hutchison & Southern Railroad Company Vol. 26, page 486, to the Kansas rate;

Kansas, Oklahoma Central & Southern, Vol. 28, page 22, to the Kansas rate; and there are a great many other statutes too numerous to mention, all of which show this state of things.

From the time that the first of these statutes were passed in 1882 until the time that the celebrated Enid and Anadarko Statute was passed, which is immaterial to this case, every railroad that was granted right of way to come into or go through the Indian Territory or Oklahoma, had attached to it a clause providing that it should not charge a greater rate for freight or passenger fare than the rate authorized by the

State out of which it was built into said Territory. The meaning therefore must be plain. The Territory had no Legislature competent to legislate—on this subject. It had no commission competent to fix or modify the rate. Therefore, Congress intended that the inhabitants and the people living in these territories should not be any more helpless than those of the States surrounding it, and that if any rate was authorized by the State out of which the railroad was built into the Territory, that such also should become the maximum authorized rate in the Territory.

In this view, that is, that the enactment amounts to a "charter maxima," to use the expression of Judge Noyes, the law must be held to be a permanent continuing statute to last as long as the grant lasts, and to be irrespective of the regulation of rates under the police power of the United States for a territory, or the State for itself.

This burden, or limitation, is so far irrespective of the right to limit to reasonable rates, as to be compulsory even though it enforces rates which lose money.

Interstate Consolidated Company, v. Mass. 207 U. S. 79;

Oklahoma City v. Okla. Ry. Co. 20 Okla. 1.

## Provisions as to future control by Congress and the state are to deny grant carrier power to charge without limitation by these powers

Following these "Charter Maxima" as to freight rates and passenger fares, are the words:

> "Congress hereby reserves the right to regulate the charges for freight and passengers on said railway and messages on said telegraph and telephone lines, until a state government or governments shall exist in said Territory, within the limits of which said railway or a part thereof shall be located; and then such state government or governments shall be authorized to fix and regulate the cost of transportation of persons and freights within their respective limits by said railway; but Congress expressly reserves the right to fix and regulate at all times the cost of such transportation by said railway or said company whenever such transportation shall extend from one state into another, or shall extend into more than one State."

Respondent desires to construe these provisions into meaning that the "charter maxima" are to last only until statehood. That thereafter the Union and the State shall respectively take over their share of control.

This construction overlooks the fact that reasonableness has nothing necessarily to do with limitation by charter maxima.

Haines v. C. R. I. & P. 13 I. C. C. R, 214;

Jones v. St. L. & S. F. R. R. Co. 12 I. C. C. R, 168;

Enterprise Mfg. Co. v. Georgia R. R. Co. 12 I. C. R. 428;

Interstate Consolidated Co. v. Mass. 207 U. S. 79;

Oklahoma City v. Oklahoma Ry. Co. 20 Okla. 1;

Also, it would be a futile thing simply to affirm the constitutional powers of Congress and the State respectively to control inter and intra state transportation.

In addition, this construction overlooks that it is provided specifically that in any event as to passenger fares for neither local (we construe this as the equivalent of intrastate) nor interstate business shall the rate exceed three cents.

The meaning of the provisions as to future control by the federal and state governments appears from its purpose, which was to specifically deny to the roads the right of charging the Kansas rate forever if the Congress or the State thought fit to reduce it.

It must be borne in mind that

"While maximum rates were sometimes prescribed, most charters empowered the railroads to make such rates as they saw fit. The policy of a majority of the states, as shown both in their charters and general laws, has always been to let rates alone. The most common provision empowered the railroad to charge such rates as may be agreed upon and established from time

to time by the directors." Noyes American Railroad Rates, p. 215.

Such a power is a contract.

The Congress meant that this road should not have the right to charge up to the maximum unless Congress and the State permitted it, therefore the right of control is *"Reserved."* For "while many of the early charters prescribed maximum rates upon that basis (mileage), and several State Statutes now contain similar provisions, *the statutory maxima have always been so high as to have no effect upon the real rates or the methods of making them."* Noyes American Railroad Rates, p. 82. See also p p 214-216 of same.

What Congress meant was this, *you may charge these people in this territory without a government as much but no more than the local laws of the state out of which you built in there.*

## Limitation has not been Modified

The subsequent Interstate Commerce Act does not remove the limitation. It is declaratory of the common law except as to procedure.

Interstate Commerce Com. v. N. Y. N. H. & H. R. R. Co. 200 U. S. 361;

The rates fixed by the Oklahoma Corporation Commission has not modified the limitation, because these rates are enjoined by the carriers.

M. K. & T. et al, v. Love, et al, 177 Fed. 493.

Nor does the right to resort to the State Commission modify the law.

Section 24 Art. IX of the State Constitution provides:

> "The right of any person to institute and prosecute in the ordinary courts of justice, any action, suit, or motion against any transportation or transmission company, for any claim or cause of action against such company, shall not be extinguished or impaired by reason of any fine or other penalty which the Commission may impose, or be authorized to impose, upon such company because of its breach of any public duty, or because of its failure to comply with any order or requirement of the Commission; but in no such proceeding by any person against such corporation, nor in any collateral proceeding shall the reasonableness, justness, or validity of any rate, charge, classification of traffic, rule, regulation, or requirement, theretofore prescribed by the Commission, within the scope of its authority, and then in force, be questioned: Provided, However That no case based upon or involving any order of the Commission shall be heard or disposed of, against the objection of either party, so long as such order is suspended in its operation by an order of the Supreme Court as authorized by this Constitution or by any law passed in pursuance thereof."

Section 22 of Interstate Commerce Act provides:

> "and nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."

## Right to Exclude Respondent from Operation in Oklahoma.

At page 8 of the bill complainant prayed:

> "and that for the continuous and continual violation of the terms of said grant the said respondent be perpetually enjoined and restrained from operating in the State of Oklahoma a railroad therein."

To this nothing has been stated by way of defense in respondent's brief.

The act of July 4, 1884, Ch. 179, Vol. 23 Stat. at Large p. 73 et seq. provides a grant to "Southern Kansas Railway Company, a corporation created under and by virtue of the laws of the State of Kansas."

> Section 10: "That the said Southern Kansas Railway Company shall accept this right of way upon the expressed condition, binding upon itself, its successors and assigns, that they will neither aid, advise, nor assist in any effort looking towards the changing or extinguishing the present tenure of the Indians in their land, and will not attempt to secure from the Indian nations any further grant of land or its occupancy than is hereinbefore provided: Provided, That any violation of the condition mentioned in this section shall operate as a forfeiture of all the rights and privileges of said railway company under this act."
>
> Also,
>
> Section 9. "That said railway company shall build at least one hundred miles of its railway in said Territory within three years after the passage of this act, or this grant shall be for-

feited as to that portion not built, that said railroad company shall construct and maintain continually all road and highway crossings, and necessary bridges, over said railway wherever said roads and highways do now or may hereafter cross said railway's right of way, or may be by the proper authorities laid out across the same."

Also section 2 provided:

"Provided, further that no part of the lands herein granted shall be used except in such manner and for such purposes only as shall be necessary for the construtiion and convenient operation of said railroad, telegraph, and telephone lines, and when any portion thereof shall cease to be so used, such portion shall revert to the nation or tribe of Indians from which the same shall have been taken."

It will be noted:

First.—That no grant or right is given respondent;

Second.—That in ease of reversion, the same shall go to the Indian Nation or tribe from which the same was taken.

Act of March 2, 1889, provided for the acquisition from Indian Tribes in the Indian Territory of land opened to settlement by proclamation of the President creating the original Oklahoma lands and others.

This followed by Act organizing Oklahoma Territory, Act of May 2, 1890, Ch. 182, Vol. 26, U. S. Stat. at Large.

Finally by various acts of Congress each of the tribes and nations ceased to have a tribal existence or

a tribal domain; therefore this part of the Act of July 4, 1884, is amended by implication and all of that section which has binding force is that there is a forfeiture, now to the state.

And that no consent has ever been given either by the United States before statehood, or the Territory of Oklahoma, or the State to this respondent to exercise the franchise of being a corporation in that State or using the grant made to its assignor.

The language of Section 9, referring to the successors or assigns of the Southern Kansas Railway Company does not give the right to that company to assign its grant to the respondent. This was decided in Oregon Railway Company vs. Oregonian Railway Company, 130 U. S., 1. That case was where a grant to a railroad, its successors or assigns created the authority in the grantee to sell to an assignee. It was held squarely that the words "successors or assigns" in a proviso attached to a statute making specific grants to a corporation does not necessarily imply that the corporation can transfer all of its property and its franchises to another corporation, to be exercised by the latter.

The court had previously held in Thomas vs. Railroad Company, 101 U. S., 71, that the powers of corporations are such only as the statutes organizing them confer upon them. Respondent being a Kansas corporation, the Kansas law did not proceed beyond the boundary of the Indian Territory. The bill, page 4, provides:

"That said Southern Kansas Railway Com-

pany accepted said grant and that the line of railway now operated in the State of Oklahoma by respondent is operated upon the grant given by said act approved July 4, 1884, and that all the conditions applicable to the original grantee apply to respondent. That ever since the respondent took over the operation of said line of railway under said grant it has continuously and continually violated the said condition of charge in that it has charged the inhabitants of said territory a greater rate of freight than the rate authorized by the laws of the State of Kansas for services or transportation of the same kind; and that said violation has been open, notorious and continuous, and that the tariffs of freight charges prepared by the respondent which are in the control of the respondent for the State of Kansas and for the Territory of Oklahoma and Indian Territory show in detail said excessive charges and are not shown in detail to complainant."

This question was presented in the case of Briscoe vs. Southern Kansas Railway Company, 40 Fed., 273, in which it was held that this Act of Congress of July 4, 1884, granting right-of-way to the Southern Kansas Railway Company did not give it authority to lease its road to respondent, that Kansas had given the grantee no right that it could transfer to the respondent in the Indian Territory or the Territory of Oklahoma, and that the law of comity only allowed corporations to exercise the usual powers of corporations and not that of transferring the duty and obligation of serving the public.

The question of laches cannot arise in this case because the State was organized but on the 16th of

November, 1907, and sufficient time has not run. Other sufficient matter also exists to repudiate any notion that the State has acquiesced in the unlawful acts of the respondent, but such matter should more properly be stated if a plea is made of laches or acquiescence. It is to be noted that this case if to be differentiated from Western Union Telegraph Company vs. Kansas, and Pullman Company vs. Kansas, recently decided in this court, in that there the right to do business—interstate business—was the matter had in mind, where here the point does not involve the right to do interstate business, but the right to exercise the franchise of being a railroad company using the roads and highways of the State and a special franchise granted to its assignor. The difference between dealing in commerce and the operation of the means which will produce an article of commerce was pointed out in Ohio Oil Company vs. Indiana, 177 U. S. 202, nor has it ever been denied that a state might refuse to grant a franchise to a foreign corporation. For instance, as to railroads, many of the states refuse to give a foreign corporation the right of eminent domain. The result of this may be to interfere with interstate commerce, but if it does so, that is an indirect effect.

Cook on the Commerce Clause of the Federal Constitution, Sec. 66 and cases cited;

Northwestern Telegraph Co. vs. City of St. Charles, 154 Fed., 386;

Western Union Telegraph Co., vs. Pennsylvania Railroad Co., 195 U. S., 540;

St. Louis vs. Western Union Telegraph Co., 148 U. S., 92;

State of Nebraska vs. Scott, et al, 36 N. W., 121;

Trestor vs. Missouri Pacific Ry. Co., 36 N. W., 503;

State vs. C. B. & Q., 41 N. W., 125;

Koenig vs. C. B. & Q., 43 N. W., 423;

Holbert vs. St. L. H. C. & N. R. Co., 45 Iowa, 23;

Evansville & Henderson Traction Company vs. Henderson Bridge Co., 141 Fed., 151;

Holtz, et al, vs. St. Louis & S. F. Ry. Co., 60 Fed., 313;

Consumers' Gas Co., vs. Harless, 29, N. E., 1062.

The United States may grant the power of eminent domain or other franchise necessary.

Union Pacific Ry. Co. vs. Burlington Co. 3 Fed., 106;

United States vs. Chicago, 7 How., 185;

Kohl vs. U. S., 91 U. S., 367;

Stockton vs. Baltimore Company, 32 Fed., 17;

Chesapeake Canal Company, vs. Union Bank, Fed. Cases, No. 2653;

In re Montgomery, 84 Fed., 896;

Monongahela Navigation Co. vs. U. S., 148 U. S., 312.

The United States did grant the right to deal in interstate commerce to the Southern Kansas Railway Company, but did not make this right assignable to respondent.

Oregon Ry. Co. vs. Oregonian Ry Co., 130 U. S., 1.

State prohibition against the consolidation of parallel or competing lines is not an interference with interstate commerce.

Pearsall vs. Great Northern Ry., 161 U. S. 646;

Louisville & Nashville Railroad Co. vs. Kentucky, 161 U. S., 677.

## The Jurisdiction of this Court where it Exists at all, is Unavoidable.

Through the brief of the respondents there lurks an insinuation that the rights, if any, of the state in the matter complained of, should be taken to some other tribunal. While it is entirely unnecessary to cite authorities on this question, yet the solemnity and the force of the reasoning make worthy of continual repetition the words of Mr. Chief Justice Marshall in Cohens vs. Virginia, 6 Wheat. 404:

"It is most true that this court will not take jurisdiction if it should not: but it is equal-

ly true, that it must take jurisdiction, if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may accur, which we would gladly avoid; but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the constitution and laws of the United States. We find no exception to this grant, and we cannot insert one."

The following are to the same effect:

"Judges do not sit on cushions of down, while administering the supreme law of the land in this court; their constitutional powers are not like those of the other departments of the government, though the case arises which brings them into existence; their exercise is discretionary *** But with us, power and duty to bring it into action are inseparable; whenever a case calls for it, the call is imperative."

Baldwin, J. dissenting. Ex Parte Crane
5 Pet. 222.

"It does not belong to this court to select the subjects of their deliberations; but they cannot

shrink from the performance of any duty imposed by the Constitution and laws."

M'Lean, J, Briscoe v. Commonwealth Bank, 11 Pet. 312.

A case is cited by respondent, California vs. Southern Pacific Co., 157 U. S. 229, is not in point upon the main point decided, that is, in this case no one else has an interest in the matter except the respondent company. But the words of Mr. Justice Harlan in his dissenting opinion in which Mr. Justice Brewer concurs, which though they may not have appealed to the majority in that case as decisive of it, must appeal to all men as decisive of this case, should be cited as follows (p. 270):

"Under the ruling now made, how is the State of California to obtain a judicial determination of the controversy between it and this foreign corporation? It is said that a suit may be brought in one of its own courts against all persons asserting an interest in the property rights here in question. The effectiveness of such a suit would depend upon the ability of the State to bring the Kentucky corporation into court, so that it would be bound by the final decree. It may be that that corporation does business in California under the condition, among others, that it will have an agent there upon whom process can be served. But surely the duty of this court, under the Constitution, to exercise its original jurisdiction in respect to a controversy between a State and a corporation of another State cannot depend upon the question whether the plaintiff State can compel that Corporation to answer in

its own courts. Suppose the defendant is an individual citizen of another State who cannot be served with process in the State desiring to bring suit against him. In such a case, the State must, under the principles now announced, be without a remedy for the protection of its rights, or it will be driven to sue its adversary in the courts of his own State, whose decision will be final, unless the controversy happens to involve some question of a Federal nature; and even then this court could only decide the Federal question presented, and must accept the decree of the state court as conclusive upon all other questions. The State could not sue in any Circuit Court of the United States, for that court has no jurisdiction under the acts of Congress of a suit brought by a state against a citizen of another State, unless perhaps such suit be one arising under the Constitution or laws or treaties of the United States. The framers of the Constitution did not intend to subject a State, under any circumstances, to the indignity of being compelled to submit its controversies, to the citizens of other States to the courts of such other States. They opened the doors of this court to every State having a cause of action against a citizen of another state."

For which reason the complainant asks that:

1. The respondent be enjoined from charging rates in excess of the rates authorized by the laws of the State of Kansas, particularly the rates set up in the bill, and

2. That the respondent be enjoined from operating a railroad in Oklahoma; and

3. That the grant made to the Southern Kansas

Railroad Company be declared forfeited to the use and benefit of the State of Oklahoma.

These three prayers are separate and distinct, and the State of Oklahoma desires that it may have the benefit of either or all of them if it is entitled thereto.

Respectfully submitted,

CHARLES WEST,

Attorney General of the State of Oklahoma.

IN THE

# SUPREME COURT

OF THE

## UNITED STATES

October Term, 1910

THE STATE OF OKLAHOMA, *Complainant*,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Respondent*.
No. 15 ORIGINAL

## Supplementary Brief by Complainant

CHAS. WEST
Attorney General of Oklahoma
For the State.

IN THE

# SUPREME COURT

OF THE

## UNITED STATES

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October Term, 1910

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| THE STATE OF OKLAHOMA *Complainant* | | |
| vs. | | No. 13 |
| THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY *Respondent* | | ORIGINAL |

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AUTHORITY TO BRING SUIT RATIFIED.

In Respondent's original brief at page 1, it complained that the Attorney General had not been requested to bring this suit by the Governor of Oklahoma, or by either branch of the Legislature.

On the 9th day of February, 1911, the Senate of the State of Oklahoma, in Session, passed a Resolution ratifying my action in instituting this suit, and clearly indicating that the legislative authority of the State desired the cause to be prosecuted.

I have attached a copy of the Resolution, with the letter of the Secretary of Senate transmitting the same, to this brief, and marked it "EXHIBIT A."

## FOR MISUSE OF FRANCHISE GRANTED SOUTHERN KANSAS ALIENATED TO RESPONDENT WITHOUT AUTHORITY, AND OPERATED IN VIOLATION OF LAW, THERE SHOULD BE AN INJUNCTION.

A direct proceeding of ouster would lie against the Southern Kansas at law, therefore, there lies in equity a proceeding to enjoin **ultra vires** acts and illegal contracts to alienate; also power to restore the grant to its status as a public highway, unimpeded by hindrances amounting to nuisances.

Act of July 4, 1884, granting right of way by Section 2, (23 Stat. 73), granted a right of way to the Southern Kansas Railway Company, and provided:

> "That no part of the lands herein granted shall be used except in such manner and for such purposes only as shall be necessary for the construction and convenient operation of said railroad, telegraph and telephone lines, and when any portion thereof shall cease to be so used, such portion shall revert to the Nation or tribe of Indians from which the same shall have been taken."

This Court held in Cherokee Nation v. Southern Kansas Railway Company, 135 U. S. p. 659, that (1) when compensation was paid that title would pass to the company, that is title in fee simple; and (2) that the right of way so acquired would be a public highway.

The Act provides that for non-user or abuser the title shall revert to the Indian Nation from which it was taken. But no such Nation now exists.

It was recently said by Judge Rogers in U. S. ex rel v. United States Express Company, 180 Fed. 1013:

> "When Oklahoma was admitted as a State into the Union, the whole of Oklahoma Territory, including the Indian Territory, had been surveyed, and allotments had been made except as to certain lands containing mineral and certain forest reservations, which were still held in trust by the United States for the Indian. Individual patents had been issued, or were in process of issuance, to the allottees; their tribal governments had been abolished; * * *"

The power reserved by the United States in the Enabling Act was only over the public land until title in the

United States was extinguished. (Par. 3, Sec. 3, 34 Stat. 270.)

As the reversion was to be not to the United States, its title was extinguished by Act of July 4, 1884. (23 Stat. 73, right of way Act.)

The tribal governments being abolished, the reversion cannot be to the Nations. Nor to the individual descendants of the tribes.

Fleming v. McCurtain, 218 U. S. 16.

The rule that dedications made to the public in the Louisiana Purchase remain for the public purpose forever, was declared by this court.

New Orleans v. U. S. 10 Peters 662.

Nor can the reversion be to the United States, it is incapable of acting as trustee in a state of a public trust as distinguished from its power and duty to the Indians.

U. S. v. Ill-Central Co., 154 U. S. 239.

## ACT PROVIDES FOR FORFEITURE.

The Act specifically provides for forfeiture, that is, reversion,

> "When any portion (of the grant) shall cease to be so used," (23 Stat. 73, Sec. 2, last proviso.)

It had already provided:

> "No part of the lands herein granted shall be used except in the manner and for the purposes only as shall be necessary for the construction and convenient operation of said railroad."

Then follows Section 4, (p. 74) prohibiting a charge for freight greater than

> "the rate authorized by the laws of the State of Kansas for services or transportation of the same kind."

> "Repeated violations by a bank of the prohibition in its charter against dealing in promissory notes and making loans at unauthorized rates of discount."

is sufficient to declare a forfeiture.

Com v. Commercial Bank, 28 Pa. St. 283.

## GRANT WITH CONTINUING CONDITION.

At pages 51 to 52 of my original brief, I have pointed out that the purpose, Section 4 of the Act of July 4, 1884, (23 Stat. 73), was to protect the shippers in the country through which the right of way was granted. That its express terms are limited to "the inhabitants of the Indian Territory" because of the exclusion law, (Sec. 2134, Rev. Stat.) which continued to be the law until March 2, 1889.

But the act clearly means to extend beyond the time of statehood, because of its provision reserving to Congress and the future State, respectively, the regulation of inter and intra state commerce.

The limitation to the rates authorized by the laws of the State of Kansas for similar services is similar to the grant to the Atlantic & Pacific, (14 Stat. 292,) limiting that grantee (Sec. 5, Act of July 27, 1866),

> "Provided, that the said company shall not charge the government higher rates than they do individuals for like transportation and telegraphic service."

This limitation ran with the grant power. In that case, after establishing this charter maximum the Congress by Act of July 16, 1892, (27 Stat. 174-183) provided an appropriation for army transportation to land aided railroads, but that

> "in no case shall more than fifty per centum of the

> full amount of service be paid * * * this compensation shall be computed upon the basis of the tariff or lower special rates for like transportation performed for the public at large."

In Atlantic & Pac. R. Co. v. U. S., 76 Fed. 186, the question of the original charter maximum with the subsequent congressional limitation was considered by Judge Wellborn, who said, (p. 196):

> "I fail to discern the inconsistency here asserted between a present limitation which the proviso mentioned imposes, and reserved power in the government to make additional limitations if future exigencies should require. After the enactment of the company's charter, further governmental restriction upon rates could, of course, be imposed only by legislation, additional and subsequent to the charter. Such legislation might or might not be required. This, obviously, would depend upon whether the rates thereafter to be fixed and determined by the company were satisfactory, or otherwise to the government; and must, of necessity, be left to the developments of the future. In the meantime there was one limitation which Congress thought it expedient to impose at once, namely that the government should not be charged higher rates than individuals for like transportation and telegraphic service."

The limitation, then, to that of Kansas was what was deemed by Congress expedient for the time.

This limitation means

> "a greater rate of freight than the *lowest rate* authorized by the laws of the State of Kansas for services or transportation of the same kind,"

because section 7 of Act of August 2, 1882, granting similar right of way to St. Louis & San Francisco Railway Company (22 Stat. 182) limited the charges to

> "No greater rate of fare or freight * * * than the lowest rate authorized by law in the States of Arkansas and Texas, or either of them, for service or business of the same kind."

These Acts are to be considered as in *pari materia,* both dealing with grants of right of way to railways through the Indian Territory made about the same time.

The Act of August 2, 1882, by providing

> "that no greater rate of fare or freight shall be charged *in the Choctaw or Chickasaw Nations,*"

also makes clear why in the Act of July 4, 1884 the limitation was expressed as "charge *the inhabitants of said territory.*" Because each of these descriptions exhausted the entire shipping public. Previous to the decision of Wabash, St. L. & P. Ry. Co. v. Ill. (118 U. S. 557, decided Oct. 25, 1886) many courts and lawyers thought that each state had the authority to control and regulate that part of an interstate journey which was within the limits of its boundaries. Under this conception there was no separation into inter and intra state administration and regulation. But the distinction firmly established in the Wabash case (*supra*) was a abroad in the minds of many persons, and led to the separate provision in the Act of July 4, 1884, that after Statehood the Federal and State Government might separately fix

charges within their separate authorities. Except for the presence of the dispute, settled not until 1886 by this Court, the provision as to what should happen after Statehood would probably not have been inserted at all.

Under grants establishing charter maxima, the claim had been made that the government, whether state or national, surrendered its rate making power. That was the contention made and denied in A. & P. R. Co. v. U. S., 76 Fed. 186.

Other instances where the claim was made are:

Stone et al. v. Farmers L. & T. Co., 116 U. S. 307;
Pingree v. Michigan Cent. R. Co., 76 N. W. 635.

A collection of cases passing on whether power to fix rates remained in the legislature or was granted irrevocably to the company, are found in the notes to

Winchester & L. & T. Co. v. Croxton, 33 L. R. A. 177 at p. 186, *et seq.*

Central Trust Co. v. Citizen's St. Ry. Co., 82 Fed. 1, is a case where unlimited power to the grantees as to charges had been given.

In Munn. v. Ill., 94 U. S. 113, the Chief Justice pointed out that the legislature might either (1) declare what shall be a reasonable compensation for such services, or (2), perhaps more properly speaking, fix a maximum beyond which any charge made would be unreasonable.

This distinction was pointed out by Mr. Justice Gray in Dow v. Beidleman, 125 U. S. 686.

The distinction between the charter maxima and separate legislative regulation was clearly put in

Ragan & Buffet v. Aiken, 9 Lea (Tenn.) 609.

The Stone case was decided Jan. 4, 1886, so that at the date of the Southern Kansas grant it was a live question. It was to head off forever this claim, influenced by the dispute settled by the Wabash case, that the reservation to Congress of power to regulate rates until Statehood, was inserted, with the separation thereafter to the dual system of government.

But Congress meant that in any event its limit as to passenger fares should not be made higher even by the future state, nor should the matter of compensation for mail be fixed by other discretion than that of Congress or the Postmaster General.

Congress thus attempted to settle all disputes it could foresee and attach a continuing condition to its grant.

See

City of Columbus v. Mercantile T. & D. Co., (decided in this court Dec. 12, 1910)

in which the court through Mr. Justice Lurton, speaking of a contract to supply the City of Columbus with water in consideration of agreements and grants made by the city says:

"The simple object of the agreement was to obtain a constant and adequate supply of wholesome water. This was guaranteed in express terms, to say nothing of the necessary implication from the character of the contract. This guarantee was a continuing one, and dominated every other detail of the agreement."

In the Act of July 4, 1884, the national government was granting free the use of hundreds of miles of right of way in consideration of service at rates not to exceed a maximum expressed by reference. This is the whole public object and must be considered fundamental, continuing and of the very essence of the road's operation.

## LIMITATION REFERS TO A CHANGING MEASURE.

As shown above, the grant to the St. L. & S. F. in Act in August 2, 1882, (22 Stat. 182) is to be construed as in **pari materia.** It provides a shifting base, i. e.,

"the lowest rate authorized by law in the States of Arkansas and Texas, or either of them."

The measure is not what was the rate authorized by the laws of Kansas on the 4th of July 1884, but the rate authorized at the time of the transportation.

See Snell, et al, v. City of Chicago, (Ill) 8 L. R. A 858 and 863. Here a grant was made to a toll road to

collect the same tolls allowed by the General Law. It means the law as it is when the toll is collected.

Kugler's Appeal, 55 Pa. St. 123;
McKnight v. Crinnion, 22 Mo. 559.

The changing measure, itself argues a continuing condition.

## LIMITATION FIXED BY REFERENCE TO KANSAS LAWS STILL CONTINUES.

Counsel for respondent agree in their brief that the passenger fare is limited forever,—we say to a maximum charge of three cents per passenger mile.

This shows intent to attach continuing condition.

As to freight, it does not appear in the pleadings that Congress has since the approval of the Act proceeded under its reserve power to regulate rates, nor that since statehood either Congress or the State have so proceeded.

The only difference in the status of passenger fares and freight rates is that the latter might by Congress before statehood, or by Congress and the State since Statehood, each within its proper sphere, (Mo. Pac. v. Kansas, L. Coop. Advance Sheets, p. 338), be modified

either **upward** or **downward**, whereas the former can only be modified **downward**.

## THE KANSAS RATES CONTINUE IRRESPECTIVE OF EARNINGS THEREUNDER.

Counsel argues in his reply brief that in any event only the valid laws of Kansas can be looked to as a measure. If valid laws are defined to mean such as the State of Kansas had the authority to enact as distinguished from such as that State, within its own borders, because of lack of earnings, has or had the authority to apply to all or any carriers, then I agree.

But whether the Kansas law is remunerative *vel non* is immaterial to this controversy.

Interstate Consol. Street R. Co. v. Mass., 207 U. S. 79;

Purdy v. Erie R. Co. (N. Y.) 18 L. R. A. 669.

If the State had stipulated that the directors might fix the rates and fares, it could not repudiate this agreement.

Reagan v. Trust Co., 154 U. S. 362, at p. 393;

Central Trust Co. v. Citizen's St. Ry. Co. 82 Fed. 1 at p. 6.

This road having acquired the use of its right of way upon this express condition, is bound thereby, irrespective of earnings.

See Union Pac. Ry. Co. v. Chicago Ry. Co., 163 U. S. 564, where it was claimed by the Union Pacific that to carry out the contract made with the C. R. I. & P. would so reduce its earnings as to impair its public usefulness.

See also as to voluntary burden, Newbury port Water Co. v. City of Newburyport, 193 U. S. 563 at p. 578.

See also B. & O. R. Co. v. Maryland, 88 U. S. 456 at p. 471-2, that the state as a condition of its franchise, or the United States as a condition of its grant, might have stipulated for any amount or thing.

But in this record the only allegations on the subject are those of bill (p. 4) of the continuous violation of the limitation, and that the respondent has complete information in regard thereto in its tariffs in its own possession, and not in that of the complainant.

And the specific allegations contained on pages 4 to 7 of the breaches of condition existing at the date the state sought leave of this court to file its bill.

If anything else is to be considered, the demurrer should be overruled and such matter set up by way of answer.

## IS THE ENFORCEMENT OF THE GRANTING ACT SOLELY FOR THE FEDERAL GOVERNMENT—AND SO FOREVER.

Counsel for the respondent urge in their reply brief the fact that the grant is federal as a supposed obstacle to the state's control of intrastate traffic and the consequent right of forfeiture because of breach of condition therein.

It is conceded that up to statehood the whole authority and duty to enact, modify and enforce the act was federal.

But since statehood that authority and duty is divided under the dual American system. Nor would it be contended that the state after statehood could claim a breach of condition occurring before statehood as a ground of forfeiture. It is claimed that a breach of condition as to intrastate rates after statehood can be asserted as such ground. And that other outrageous breaches occuring continuously and continually since the occupation of the right of way by the respondent, can be alleged and proved as showing the greedy persistence and wilful lawlessness of the respondent's acts, justifying now a forfeiture.

The citations from the Wilmington Railroad Case

and the Gulf and Ship Island case, only go to show that a franchise, while *legally exercisable,* is property, not that it is such *unforfeitable* property.

The North River Bridge case asserts that Congress might incorporate a bridge company for interstate commerce.

I admit it.

Southern Pacific R. Co v. U. S. asserts that the Congress might endow a state corporation with franchises. I admit it.

Neither asserts that Congress might endow either a federal or state corporation with the power, after statehood, to break those portions of a contract made for the future state, and anticipatory of its control.

When the state enters the Union, it does so clothed with all the powers of each of the original thirteen.

Bolln v. Nebraska, 176 U. S. 83.

The acts of Congress of a municipal as distinguished from a federal nature, are anticipatory of and as guardian for the future state.

In re Larkin, 1 Okla. 53;
U. S. v. Pridgeon, 153 U. S. 48, at p. 53;
Pollard's Lessee v. Hagan, et al., 3 How. 212.

The bank cases mentioned by respondent do not affect the question of what exemption, if any, Congress might grant

a corporation from control by state laws, for it was held that the national banks were in all of their transactions subject to national control. Nor was such a question presented in the Dunn case or the Pacific Removal cases.

Besides it was definitely decided that, though a railway be organized under a federal statute and endowed with federal franchises, it is still subject to control by each state it operates through as to the intrastate business of that state.

Reagan v. Mercantile T. Co., 154 U. S. 413.

Recently it was strongly intimated, if not held by this court, that matters of local concern could not be brought under the sway of the general government.

Mo. Pac. Co. v. Kansas, (L. Coop Advance Sheets, 338.)

Power to control, without power to punish for violation of command, would be a farce. Forfeiture is a usual and proper form of punishment for persistent, intentional, open, notorious violation of law.

## DOES THE LIMITATION END WITH THE GOVERNMENT'S JURISDICTION?

Counsel suggests that the limitation ceases with the Government's jurisdiction.

We have shown that Schedule 2 of the State Constitution constituted the federal granting act an Oklahoma law, being a law in force.

Laws may as well be enacted by reference as by re-enacting specific words.

Chenango Bridge Co. v. Binghampton Co., 3 Wall 51;
Schwenke v. Union D. & R. Co. 7 Colo. 512; 4 Pac. 905;
In re Larkin, 1 Okla. 53;
Pridgeon v. U. S. 153 U. S. 53.

Though Congress may regulate interstate business and incorporate companies therefor, yet the police power of the state remains intact.

Louisville Co. v. Kentucky, 161 U. S. 702;
Cleveland Co. v. Illinois, 177 U. S. 516.

## THE RESPONDENT NEVER AUTHORIZED TO OPERATE IN OKLAHOMA.

In its reply brief respondent complains of what it conceives to be a failure to state that it is operating in Oklahoma without requisite authority. But an allgation of that kind would not be one of fact, but a conclusion of law.

I have alleged the fact (p. 2, Bill) that respondent is a Kansas corporation, that (p. 4, Bill) it operates in Oklahoma

under the Act of July 4, 1884. It follows as a conclusion of law that its authority so to do is wanting.

Because the act did not permit the grantee to alienate the franchise.

Thomas v. Railroad Co., 101 U. S. 571;

Oregon Ry. Co. v. Oregonian Ry. Co., 130 U. S. 1.

And because the law of Oklahoma did not permit the alienee to accept the alienated franchise

Briscoe v. Southern Kansas Ry. Co., 40 Fed. 273;
T. & B. R. Co. v. B. H. T. & W. Ry. Co., 86 N. Y. App. 110.

Counsel attempts to answer this by asserting how easily he can show Judge Parker was wrong in the Briscoe case. Fortunately for me he confines his effort to the mere assertion, and also that this court recently said in Mo. Pac. v. Kansas, (L. Coop. Advance Sheets of 218 U. S. p. 338), speaking through the present Chief Justice, as to charter rights:

> "Manifestly, the mere fact that the charter of the road contemplated that it should be projected into several states did not change the nature and character of our constitutional system, and therefore did not destroy the power of Kansas over its domestic commerce, or operate to bring under the sway of the United States matters of local concern, and *of course could not project the authority of Kansas beyond its own jurisdiction.*"

But he does assert, apologetically as it were, in view of

his other assertion, (page 12 of his reply brief) how unimportant it is that the Southern Kansas is authorized by Oklahoma law to sell or lease its road in Oklahoma to the respondent.

In the first place, if the respondent claims the right to operate in Oklahoma under a sale or lease by the Southern Kansas, that fact is an affirmative matter of defense that does not appear in the bill.

If the casual information to be gleaned from respondent's reply brief is to be substituted for an answer, then we say that the Oklahoma law of 1901, amendatory of the Act of 1899, is to be taken and construed in connection with the law existing at the time of its enactment. They all concern railroad operation in Oklahoma, and are to be considered in *pari materia.*

U. S. v. Saunders, 22 Wall. 492;
Viterbo v. Friedlander, 120 U. S. 707.

The Act of 1890, Sec. 1041, authorizes consolidation of railroad properties where the two roads can be lawfully connected and operated together as one continuous line, upon conditions as to filing of new articles, etc., therein named. It provides:

> "Any railroad corporation may consolidate its stock, franchises and property with any other railroad corporation, whether within or without the Territory, when their respective railroads can be lawfully connected and

operated together to constitute one continuous main line, with or without branches, upon such terms as may be agreed upon, and become one corporation, by any name selected, which, within this Territory, shall possess all the powers, franchises and immunities, including the right of further consolidation with other corporations under this section and be subject to all the liabilities and restrictions of this article; and such in addition as such corporatons peculiarly possess, or were subject to, at the time of consolidation by the laws then in force, applicable to them or either of them. Articles stating the terms of consolidation shall be approved by each corporation by a vote of the stockholders owning a majority of the stock in person, or by proxy, at a regular annual meeting thereof, or a special meeting, called for that purpose, in the manner prescribed in section 1033, or by the consent in writing of such stockholders, annexed to such articles; and a copy thereof, with a copy of the records of such approval or such consent, and accompanied by lists of their stockholders and the number of shares held by each, duly certified by the respective presidents and secretaries, with the respective corporate seals of such corporations affixed, shall be filed for record in the office of the Secretary of the Territory, before any such consolidation shall have any validity or effect. Any railroad corporation whose line is wholly or in part within this Territory, whether chartered by or organized under the laws of this Territory, or of any other state or territory, or of the United States, may lease or purchase and operate the whole or any part of the railroad of any other railroad corporation, together with the franchises, powers, immunities and all other property or appurtenances appertaining thereto when such railroads can be lawfully connected and operated together, so as to constitute a continuous main or branch line. And all such purchases or leases heretofore made or entered

into, are for all intents and purposes hereby ratified and confirmed: PROVIDED, That in no case shall the capital stock of the company formed by such consolidation exceed the sum of the capital stock of the companies so consolidated at the par value thereof, nor shall any bonds or other evidences of debt be issued as a consideration for or in connection with such consolidation."

In the third sentence thereof it provided power to the alience to lease, purchase or operate.

The proviso contained in the fourth sentence evidently meant that the third sentence is the method in which the consolidation should be effected.

It is to be noted that Sec. 1041 does not give power to a franchisee to alienate, but power to accept the alienation only.

Morrill v. Smith Co., 89 Tex. 529, 36 S. W. 56;
St. L. Co. v. Terre Haute Co., 145 U. S. 393;
L. & N. Co. v. Kentucky, 161 U. S. 677;
Thompson on Corp., 2nd Ed. Sec. 6047.

It doubtless was because of this lack of specific authority to sell that the act of February 24, 1899, was passed (Session Laws Oklahoma, 1899, p. 110-1). It provides that specific authority. This was amended in 1901, (Session Laws Oklahoma, 1901, pp. 86-7) to grant its relief to roads not only owning a road in Oklahoma, but also owning one elsewhere.

But it does not appear that the Act of 1899, as amended, was intended to take the place of Sec. 1041. The latter was a part of an Act dealing comprehensively with railroad in-

corporation, construction and operation. Certainly the sections preceding and following it are not repealed. And because there is no inconsistency between Section 1041 and the Act of 1899, as amended, both should stand and be construed together. That is, the filing of the articles named is required. The Court cannot presume that such articles were filed. Because the filing of such articles would constitute the consolidated company a domestic corporation in Oklahoma.

Baldwin v. Chi. R. Co., 86 Fed. 167.

But the bill expressly pleads that defendant is a citizen of Kansas, and if it were a citizen of Oklahoma this court would not have jurisdiction of this action.

Nor can the court presume that the respondent, if it attempted to comply with the consolidation law, has actually done so.

Thompson, Corp., 2nd Ed. Sec. 6054.

*Nor can the court presume that, after the 24th of February, 1899, that respondent complied with the act of that date.*

Indeed, from 40 Fed. 273, it appears that *the lease from the Southern Kansas to the respondent's predecessor was previous to October 5, 1889, the date of the decision, and thus not possibly under the act of February 24, 1899.*

It cannot be thought for a moment, therefore, that respondent acted under either the act of 1890 or the supple-

mentary provision contained in the Act of 1899 as amended in 1901.

The authorities in the Supreme Court of Kansas and by Judge Brewer in the Venner case are not inconsistent with this view.

Of course, when a suit is brought in Kansas, either in the state or the federal court, to prevent the directors of a Kansas corporation from, in Kansas, accepting the bonds of and guaranteeing the mortgages of a foreign road (Fletcher and Venner cases) the measure of the powers of the Kansas corporation is to be found in the Kansas law. It will be presumed in a Kansas tribunal that the laws of foreign states are the same as those of Kansas.

But this case is where the law of Oklahoma only opened the door to a foreign corporation by acquisition of an Oklahoma railroad provided it formed an Oklahoma consolidated company under Section 1041 of Laws of 1890.

The answer to counsel's position is obvious.

> "In Wisconsin the laws of Illinois have no operation."
>
> Per Field, Justice, in Railway Co. v. Whitton, 13 Wall. 270.

## CASES CITED BY RESPONDENT IRRELEVANT.

In the case of Green Bay & Minn. R. Co. v. Union Steamboat Co., 107 U. S. 98, the steamboat company, a New York corporation, brought suit in Wisconsin against the railroad company ,a Wisconsin corporation, on a contract to guarantee profits of a joint traffic enterprise. The railroad alleged that the contract was *ultra vires* as to it, i. e., the Wisconsin corporation, and denied knowledge as to whether the New York company was adequately empowered or not. The court says, (p. 100):

> "The only question * * * is whether, under the general laws of the State of Wisconsin, and the defendants' charter (The Wisconsin company)' * * * is *ultra vires of the defendant corporation.*"

Of course, what a Wisconsin company may do as to its property and franchises in Wisconsin, must be measured by Wisconsin law. Whereas, here respondent's effort is to measure the right in Oklahoma of Kansas corporations as to Oklahoma franchises by Kansas law.

Canada Southern R. Co. v. Gebhard, 109 U. S. 527, at page 537, affirms that a corporation's rights must be measured in the first place by the law of its charter government, that it may do business elsewhere, but if so, only such busi-

ness as BOTH "its charter allows and the local laws do not forbid."

That was a case of holders of bonds issued in 1871 under the authority of Canada law (p. 531 and 528) being compelled later on to take in exchange other bonds also provided for by Canada law. There was no question whether a franchsie in the United States could be transferred by Canada law without the consent of the franchise granting power.

In Railroad Co. v. Koontz, 104 U. S. 5, the B. & O. Co. of Maryland was granted rights in that State by Act of March 2nd, 1827, then Virginia granted the same rights, except as to building a lateral road in Virginia without the consent of the latter State. In 1873 the B. & O. took under a lease from a Virginia Company possession of a road in West Virginia. The Court held that thereby B. & O. did not become a Virginia citizen so as to forfeit the right of removal to a federal court; further, that by the grant of 1827 and subsequent acts, Virginia had consented to all that had been done. The court did not hold that the assent of Virginia was unnecessary, but, on the contrary, that it *was given "unconditionally."*

The Relfe case, the Fletcher case, the Christian Union case, none of them concern alienations of public franchises.

Nothing in conflict with our views is found in Penn.

Co. v. St. L A. & C. Co., 118 U. S. 290. That was a case where an Illinois company was authorized by laws of Indiana to build into the latter state and exercise as to the Indiana portion therein such powers as it had in Illinois under its charter. (p. 296) This amounted to the re-enactment in Indiana of Illinois law, which therefore was examined to determine its rights in Indiana.

The case of P. C. & St. L. v. C. C. & I. C., 8 Bissell 485, expressly held that the leasing was authorized by the laws and public policy of the state (Indiana) where the franchise was. Whereas in Oklahoma such transfer could be made previous to Statehood only by consolidation under the law, and is expressly prohibited since Statehood by the Constitution. [Article IX, Section 9, (forbidding consolidation to domestic lines) and Section 44, (forbidding authorization to a foreign company of what is denied to a domestic.)]

It is immaterial as to what rights were granted to the Southern Kansas by Congress. Such as they were, there was no authority to alienate them. Section 10 of the Act of July 4, 1884, was in all respects like the act passed upon in Oregon Co. v. Oregonian Co., supra. As to respondent, it had no different power granted it by its investment in Oklahoma Territory than by the laws of that territory were granted a domestic corporation therein. Only such of the laws of that

territory were extended in force in the state as were in harmony with the Constitution. (Schedule, Section 2.)

By Section 2 of Article 9 of the Constitution the right is granted to domestic companies to construct and operate.

By Section 11 of Article 9 it was provided that only upon complete acceptance of the conditions of the Constitution might any company *in existence* take the benefit of future legislation.

By Section 41, all companies chartered *or licensed* in the state are expressly forbidden to own, hold, or control in any manner the stock of another corporation engaged in the same kind of business, whether in or out of the state.

Neither could the acts of the Territory of Oklahoma, if they had so intended it, so confined the power of the future state as to stifle the life of these police provisions.

> Meyer v. Manhattan Bank, 20 Ohio 283;
> Bolln v. Nebraska, 176 U. S. 83.

These provisions of the Constitution thus expressly forbid the respondent to own the stock of the Southern Kansas (Sec. 41); prevent laches intervening (Sec. 11); prevent sale of franchise (Secs. 9 and 44), and by exclusion prevent operation (Sec. 2) to the respondent in Oklahoma.

## CORRECT RULE, OKLAHOMA LAW GOVERNS.

Counsel suggests that the Southern Kansas might lease or sell its road, because the law of Kansas so said (p. 14). He does not say which it did.

While nothing done by a corporation is valid unless authorized by its charter, yet, also, every power exercised by a corporation in another state depends for its validity upon the law of the place where it is exercised.

Bank of Augusta v. Earle, 13 Pet. 589;
Building & Loan Ass'n. v. Griffin, 90 Tex. 490, 39 S. W. 660;
Carroll v. East St. Louis, 67 Ill. 570, 580;
In re Bugbee, 4 Fed. Cas. 611;
Runyan v. Coster, 14 Pet. 129;
Holbert v. St. Louis R., 45 Ia. 26;
Clarke v. Central R. Co., 50 Fed. 345, 15 L. R. A. 687, and notes.

## COMITY DOES NOT OVERRULE PUBLIC POLICY OF STATE.

"Whenever a state sufficiently indicates that contracts which derive validity from its comity are repug-

nant to its policy, or are considered injurious to its interests, the presumption in favor of its adoption can no longer be made."

Per Campbell, J., McDonough v. Murdock, 56 U. S. (15 How.) 367, at 413.

It is an offense to common sense to say that the exercise of a public franchise which is prohibited to citizens generally can be presumed from comity.

The laws of Oklahoma prohibit operation of railways by citizens generally by limiting this power to domestic corporations.

Right to maintain and operate road and take tolls is a franchise.

Blake v. Winona Co., 19 Minn. 418;
Talcott v. Pine Grove Twp., 1 Flipp, 120.

As to leases it is well settled that quasi public corporation cannot lease their franchises and property necessary to the performance of their public duties.

Thompson, Corp. 2nd Ed. Sec. 2452.

No alienation of such franchises can be made without legislative assent.

Thomas v. R. Co., 101 U. S. 71;
Thompson, Corp. 2nd Ed. Sec. 2906.

Such authorization is strictly construed.

Oregon Co. v. Oregonian Co., 130 U. S. 1.

## WHAT TO BE FORFEITED.

Respondent complains that I am not definite as to what I wish forfeited.

Railroads, both heretofore and hereafter constructed, are highways in Oklahoma.

Const. Okla., Art. 9, Sec. 6.

So held by this court.

Olcott v. Fond du Lac Co., 16 Wall. 678 at p. 694.

In Erie Co. v. Casey, 26 Pa. St. 287, a charter was repealed and the state government took possession of the road. This was claimed to be seizing private property. At page 307, Black, J., says:

> "This act takes nothing but the road. Is that private property It is a public highway, solemnly devoted to the public use. When the lands were taken, it was for such use, or they could not have been taken at all."
>
> "Railroads established upon land taken by the right of eminent domain (here dedication from the public domain to public use) by authority of the commonwealth, (here anticipatory of the authority of the commonwealth) created by her laws as thoroughfares for commerce, are her highways. *No corporation has property in them, though it may have franchises annexed to and exercisable within them.*"

I desire the use of these attached franchises annulled to the respondent.

See Talcott v. Twp. of Pine Grove, 1 Flipp. 146, on same subject.

## RULE OF HIGHWAYS—RULE OF RAILWAY RIGHT OF WAY.

By a long line of decisions this Court has held identical in principle the law of the railway right of way grant and the law of the highway dedication. See

Lake Superior Co. v. U. S., 93 U. S. 442 at p. 450;
A. T. & S. F. Co. v. D. & N. Co., 110 U. S. 667 at p. 677;
U. P. Co. v. C. R. I. & P. Co., 163 U. S. 564 at p. 585.

## DEDICATION TO RAILWAY USE SIMILAR TO DEDICATION FOR HIGHWAY USE.

The interest of the grantor in the use is given by his consent or by judicial condemnation. Especially is a railway a public highway as to its right of way. The estoppel of the owner, the United States or the Indian Nations, is the same

whether used for a railway highway or common highway. Only the state is interested as to which use when the quasi public corporation loses its franchise.

T. & N. O. Ry. v. Sutor, 56 Tex., 496, at p. 499.

## LAND DEDICATED TO QUASI PUBLIC HIGHWAY USE BECOMES COMMON HIGHWAYS ON TERMINATION OF SPECIAL USE.

A familiar instance is turnpikes. The resumption of the sovereign power in the franchise leaves the easement in public in the road. The land owners (grantors or successors) presumed to have received full compensation for the permanent easement.

State v. Maine, 27 Conn. 642;
Craig v. People, 47 Ill. 487 at p. 493;
Northern Central Co. v. Com., 90 Pa. St. 300;
P. McK. & Y. Co. v. Com., 104 Pa. St. 583 at p. 586;
McManus Appeal, 5 Pa. Sup. Ct. R. 65;
Peo. v. Bd. Supervisors, 151 N. Y. 190;
State v. Noblesville Co., 83 Md. 466 at p. 469;
Comr. Highways v. Cobb, 104 Mich. 395;
Virginia Co. v. Peo. 22 Colo. 429, 37 L. R. A. 711, and notes.
Wood et al. v. Turnpike Co., 24 Cal. 475;
Peo. v. Davidson (Cal.) 21 Pac. 538;
McMullin v. Leitch et al. (Cal.) 23 Pac. 294;

Blood v. Woods, (Cal.) 30 Pac. 129;
Kellett v. Clayton Co., (Cal.) 33 Pac. 885.

The rule is the same when the right of way is granted by Congress.

Western Plank Co. v. Central Tel. Co., 116 Ind. 229;
Nevada v. Lake, 8 Nev. 276 at p. 281.

Or under acts of a territorial legislature.

State v. Lake, supra;
State v. Dayton Co., 10 Nev. 155, p. 162.

The matter is tersely put as follows:

"The fee title being conveyed, there could be no reversion. If, for any reason, the turnpike company ceased to exist, and could not longer own the land, it might escheat, but it would not revert." Per White, J., in

Langston et al. v. Edwards et al., (Ky.) 54 S. W. 833.

## FORFEITURE OF FRANCHISES.

Franchises in highways made by other portions of government than state are upon breach forfeitable by action by state.

Familiar instances are afforded by cities.

Upon breach of condition, city or state may enter and appropriate or have judicial forfeiture according to circumstances.

Pacific Railroad v. Leavenworth, 1 Dill. 393;
State v. Madison Street Ry. Co. (Wis.) 1 L. R. A. 771, at p. 773;
Arcata v. A. & M. R. Co. (Cal.) 28 Pac. 677;
Minersville Borough v. Schuykill Co. (Pa.) 54 Atl. 1050.

Grantee's franchise forfeitable for unauthorized sale or non-user.

Peo. v. Pres. Directors of Turnpike Co., 23 Wend 254;
State v. Turnpike Co., 8 R. I. 521;
Railway Co. v. State, 75 Tex. 434.

Grant such as that of Southern Kansas is continuing condition, and upon breach franchise may be terminated.

Farmers' L. & T. Co. v. Galeburg, 133 U. S. 156 at p. 179;
City of St. Cloud v. W. L. & P. Co. (Minn.) 92 N. W. 1112.

It is immaterial that the grant does not express this as ground of forfeiture.

St. Cloud v. W. L. & P. Co., supra.

Where one corporation, through abandonment, sale or otherwise, ceases to operate a franchise in a highway, the unauthorized operation thereof by another company is subject to abatement by injunction.

State v. Scott (Tenn.) 36 L. R. A. 461.

Charges in excess of maximum fore-stipulated in the franchise acquired by a street railway company is sufficient ground for forfeiture of right to use such lines.

State v. Railway and Light Co., 23 Ohio Cir. Ct. 604.

As against the Southern Kansas, therefore, the proper remedy is *quo warranto*, but as against respondent injunction is proper.

Injunction proper remedy as against unauthorized corporation taking tolls after abandonment of privilege by franchise.

State v. Allison, 36 L. R. A. 457 (Mo.)

Whenever a corporation uses powers not warranted by Act of Parliament whose exercise is injurious to the public interests, the Attorney General may file an information for an injunction, as if to abate a nuisance.

Attorney General v. Gt. North. Ry. Co., 6 Jur. (U. S.) 1006.

## NO INTERFERENCE WITH INTERSTATE COMMERCE.

As to a like situation in Mo. Pac. v. Kansas, 218 U. S. P. 338, Mr. Justice White said:

"Manifestly, the mere fact that the charter of the road contemplated that it should be projected into several states, did not change the nature and character of our constitutional system, and therefore did not destroy the power of Kansas over its domestic commerce, or operate to bring under the sway of the United States matters of local concern, and of course could not project the authority of Kansas beyond its own jurisdiction."

We urge, therefore, that the demurrer should be overruled. As the case stands there should be a decree anulling the grant, enjoining the excess rates and enjoining the illegal operation by respondent.

Respectfully,

CHARLES WEST,

*Attorney General of Oklahoma,*

For the State.

## EXHIBIT A

### SENATE CHAMBER

Oklahoma City, Okla., February 10, 1911.

HON. CHARLES WEST, Attorney General,
Guthrie, Oklahoma.

Dear Sir: By direction of the President of the Senate I herewith enclose you copy of Senate Rerolution No. 15, by Thompson, which was adopted by the Senate on February 9th, 1911, and signed by the President pro tempore in open session.

Very respectfully,

T. M. MILLER,
Secretary.

### SENATE RESOLUTION NO. 15—BY THOMPSON.

Whereas, the authority of the Attorney General of the State of Oklahoma to bring and maintain certain actions in the Supreme Court of the United States, No. 13 original therein, now pendnig in the name of the State of Oklahoma v. The Atchison, Topeka and Santa Fe Railroad Company, to cancel and have declared a public highway the right of way

of said company to the State of Oklahoma because of the breach of the condition upon which the same was granted, has been questioned;

Now, Therefore, It Is Hereby Resolved, That the said Attorney General be, and he is hereby directed to maintain and prosecute said action to its final conclusion and to institute and maintain all such other actions, suits or proceedings as in his judgment may be necessary to protect the interests of the State, and to appear either to prosecute or defend in any court or tribunal, at any proceeding and at any stage thereof, when the interest of the State, in his judgment, demands the same, and all or any defenses heretofore made are ratified and confirmed.

Adopted by Senate, February 9, 1911.

J. ELMER THOMAS,
President Pro Tempore, Senate.

## ADDENDA

Upon the question of whether when public rights are granted a public service corporation with a maximum charge fixed in the grant for the use of the service,

1. Equity by injunction can relieve against charge beyond said maxima,

2. In a suit by a citizen for whose benefit the maxima were stated,

3. Irrespective of whether the resulting returns are adequate.

Chicago Tel Co ~~Ill Supreme Court~~

~~Peo. vs. Chicago Tel. Co.~~ 106 Ill., App. 54.

Simon & Sons vs. Md. T. & Tel. Co., 63 L. R. A. 727.

Peo. vs. Chicago Tel Co. 220 Ill. 238; 77 N.E. 245

Peo. vs R. Co. 178 Ill. 594

Manning vs. C. & P. Co. 18 App. D. C. 191

The force of the last case is not broken by the reversal in 186 U. S. 238. The majority opinions did not cover this point. The dissenting opinion maintains the points.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1910.

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No. 13

Original.

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THE STATE OF OKLAHOMA,
*Complainant,*

*vs.*

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY.
*Respondent.*

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## BRIEF OF RESPONDENT ON ITS DEMURRER.

Apparently without authority or request from the Governor of Oklahoma, or either branch of its Legislature as seems to be required by the laws of that State (*State ex rel. Haskell, Governor,* v. *Huston, Judge of Eleventh Judicial District, et al.*, 97 Pacific, 982) the Attorney General of that State has undertaken to file a bill in its behalf to enjoin obedience on the part of respondent to the alleged provisions of an Act of Congress which granted some years ago to respondent's predecessor

the right to construct and operate a railroad in what was then Indian Territory, but is now embraced within the State of Oklahoma, and principally to forfeit to the State the railroad so constructed.

It is charged that in the Act of Congress approved July 4, 1884, entitled "An Act to grant the right of way through the Indian Territory to the Southern Kansas Railway Company and for other purposes" (Chap. 179, p. 73 *et seq.*, 23 United States Statutes at Large) the Southern Kansas Railway Company, a corporation created under the laws of the State of Kansas, was given the right and was empowered to construct, operate, maintain and use lines of railway described in what was then known as the Indian Territory; that in said Act it was provided, "that said railroad company shall not charge the inhabitants of said Territory a greater rate of freight than the rate authorized by the laws of the State of Kansas for services or transportation of the same kind," etc.; that the grant was accepted and the line constructed under said Act, but that since respondent took over the operation of said line of railway under said grant it has continuously and continually (though when or how long is not stated) violated said condition in that it had charged the inhabitants of said territory a greater rate of freight than the rate authorized by the State of Kansas for services or transportation of the same kind. (The only statute or law of the State of Kansas, however, which is specifically referred to as fixing rates for transportation of freight is a legislative enactment of May 29, 1909, passed long after the Indian Ter-

ritory ceased to exist in the locality in question, and after Oklahoma had been admitted as a State.)

The line of railroad described which was originally constructed in what was then embraced in the Indian Territory was upon the creation of the Territory of Oklahoma sometime in 1890 embraced in that Territory, and the Indian Territory thereafter was made to embrace or cover a much smaller area or territory than formerly. In November, 1907, on the admission of Oklahoma as a state, the entire territory was embraced in the state.

The State claims that the charging of the higher rates specified than those prescribed in the subsequent laws passed by the State of Kansas for similar transportation is an injury to the property rights of the State, though in what respect is not stated or even suggested.

The complainant prays after waiving answer under oath (which could hardly have been required of a corporation) that the grant made by said Act of Congress be by this Court cancelled and held for naught, and the property thereby granted be confirmed and decreed to be in the State of Oklahoma as *cestui que trust,* and that defendant be perpetually enjoined from charging the inhabitants of the State of Oklahoma a greater rate of freight than that authorized by the laws of the State of Kansas for services or transportation of the same kind; and that for the continuous and continual violation of the terms of said grant said respondent be perpetually enjoined and restrained from operating in the State of Oklahoma a railroad therein.

To this extraordinary bill of complaint, with its extraordinary prayer, defendant has filed a general demurrer in equity, also questioning the original jurisdiction of this court. The questions involved are purely legal and, we believe, may be readily determined.

Inasmuch as the grant in question was not from the State of Oklahoma, but from the government of the United States, acting through Congress, the State is in no position to complain that the terms or conditions of such grant are not being complied with if at all, since such a complaint must necessarily rest alone with the grantor, which may enforce or waive the condition or determine for itself the extent to which compliance should be had. The United States would be an indispensable party to such litigation. It has not consented to be sued or to become a party.

In any event the provision referred to was by its terms operative only during the period that the territory through which the railroad might be constructed should remain as the "*Indian Territory.*"

The bill does not set up a controversy of a civil nature between the state and a citizen of another state justiciable in this court under its original jurisdiction as no right or law of the state is involved or in dispute.

# ARGUMENT.

## I.

THE GENERAL GOVERNMENT ALONE AND NOT THE STATE OF OKLAHOMA HAS THE RIGHT TO ENFORCE OBEDIENCE TO THE TERMS OF THE GRANT FOUND IN ONE OF ITS LAWS.

Congress by an Act approved July 4, 1884 (Chap. 179, Vol. 23, United States Statutes at Large) invested and empowered the Southern Kansas Railway Company, a corporation created under the laws of the State of Kansas, with the right of locating, constructing, owning, equipping, operating, using and maintaining a railway and telegraph and telephone line "through the *Indian Territory,*" beginning at a point on the northern line of said Territory where an extension of the Southern Kansas Railway from Winfield, Kansas, in a southerly direction would strike said line, running thence south to a point at or near where the Washita river empties into the Red river, with a branch line in the western part of said Territory from Medicine Lodge creek to Wolf creek on the western line of said Territory. Provision was made for the payment of compensation to the Indian tribes which were then in possession of the entire Territory; also with reference to freight and passenger rates hereafter more particularly referred to; also for the jurisdiction of certain federal courts in respect to matters arising under the act. But the only provisions for ferfeiture were those found in

Sections 9 and 10 of the act, namely;—on failure to build at least one hundred miles of railway in the Territory within three years, the grant to be forfeited as to the portion not built, and also that the railway company, its successors and assigns, should not aid, advise or assist in any effort looking towards the changing or extinguishing of the present tenure of the Indians in their land, and should not attempt to secure from the Indian nations any further grant of land or its occupancy than in said act provided. In Section 12 it was provided: "Congress may, at any time, amend, add to, alter or repeal this act."

At the time of the passage of the above law and at the date of the construction of the railroads therein mentioned, the Indian Territory, which then embraced what is now included in the entire State of Oklahoma, was in the possession of Indian tribes. Subsequently, by the act approved May 2, 1890, (Chap. 182, Volume 26 United States Statutes at Large) the Territory of Oklahoma was carved out of a portion of the above Territory and a territorial government was organized over the same.

The act of Congress in question granting the right to construct, operate, and use the railway constructed thereunder was passed under the constitutional power of that body to regulate commerce among the several states and with the Indian tribes.

*Cherokee Nation* v. *Southern Kansas Railway Co.*, 135 U. S., 641, which arose under the above act.

*California* v. *Pacific Railroad Co.*, 127 U. S., 39-40.

The powers, rights and privileges with respect to the railroad so constructed were granted by the general government acting through Congress and are still subject to the control of that body.

Congress reserved to itself the right at any time to amend, add to, alter, or repeal the act in question. It still has jurisdiction over the railroad and the United States has the power to enforce its own laws and the conditions, if any, of its own grants. The general government is the sovereignty which alone represents the people in each state and is the *parens patriae* so far as the enforcement of the federal laws are concerned. The State of Oklahoma was not the grantor and can only assert such rights in the premises as Congress has granted to it. Ordinarily the grantor alone can complain of a failure to perform some condition subsequent of a grant or can enforce such condition.

*United States* v. *Southern Pacific Rld.*, 146 U. S., 570, 606, 607.

Congressional authority to institute proceedings to revoke or forfeit the grant is necessary.

*United States* v. *Northern Pacific R. Co.*, 177 U. S., 440, 441.

Is not the general government—the United States—an indispensable party to any suit which seeks to forfeit or affect a grant made by it? Would it not be entitled to any forfeiture if decreed? As grantor it obviously would be and, therefore, this suit could not proceed without its being made a party.

*California* v. *Southern Pacific Company*, 157 U. S., 229.

But the United States cannot be sued without its consent and the state cannot have decreed to it that which would go to the United States if a forfeiture were decreed. In the absence of congressional legislation waiving the immunity of the United States to suit or giving consent to this suit this court would evidently be without jurisdiction.

*Oregon* v. *Hitchcock,* 202 U. S., 60, 68, 69.

Upon what rule or principle can the State of Oklahoma claim that the forfeiture should inure to it as prayed for in the bill? This suggests that the United States alone may call the railway company to time for alleged failure to comply with the grant. It is quite likely officers of the general government would not construe the act of Congress as do the Oklahoma officials and that they would not institute such a suit as this after investigation.

Of course it may be conceded for the purpose of this argument that shippers interested might complain where their rights were given and protected under such law, but in enforcing such rights they would necessarily seek to enforce a federal and not a state law.

## II.

THE PROVISION OF THE ACT OF CONGRESS REFERRED TO IN THE BILL IN RESPECT TO FREIGHT RATES CEASED TO BE OPERATIVE ON THE CREATION OF THE TERRITORY OF OKLAHOMA WITH REFERENCE TO THE LINES EMBRACED THEREIN AND CERTAINLY ON THE CREATION OF THE STATE.

A reference to the provisions of the act of Congress in question will plainly show that the territory in which the railroad was to be constructed, then known and designated as the "Indian Territory," was in the possession and occupancy of Indian tribes. There were no doubt white men, such as traders and others, also living or doing business in that territory. There was, however, then, no organized local government over the same, nor, indeed, any local government other than that of the semi-civilized tribes, which, however, had jurisdiction only over their respective members. Neither was there then any tribunal, created by Congress or otherwise, empowered to regulate or prescribe railroad rates or to ascertain the reasonableness thereof in such Territory. The Interstate Commerce Law had not then been passed, and it was some years after the passage of that law before the Interstate Commerce Commission was given jurisdiction over intra-territorial transportation. Congress, therefore, deemed it necessary to prescribe some rule as a *temporary* expedient for the protection, against extortion, of the *inhabitants* of the Indian Territory (while it remained such) who should have occasion

to use the railroad. It therefore provided in Section 4 of the act, as follows:

> "That said railroad company shall not charge the *inhabitants* of *said Territory* a greater rate of freight than the rate authorized by the laws of the State of Kansas for services or transportation of the same kind; Provided: that passenger rates on said railway shall not exceed three cents per mile. Congress hereby reserves the right to regulate the charges for freight and passengers on said railway and messages on said telegraph and telephone lines, until a state government or governments shall exist in said Territory, within the limits of which said railway or a part thereof shall be located; and then such state government or governments shall be authorized to fix and regulate the cost of transportation of persons and freights within their respective limits by said railway; but Congress expressly reserves the right to fix and regulate at all times the cost of such transportation by said railway or said company whenever such transportation shall extend from one state into another, or shall extend into more than one state: Provided, however, That the rate of such transportation of *passengers,* local or interstate, shall not exceed the rate above expressed, And provided further, That said railway company shall carry the mail at such prices as Congress may by law provide; and until such rate is fixed by law the Postmaster-General may fix the rate of compensation."

The prohibition is against charging "*the inhabitants of said Territory*" (that is, the Indian Territory referred to in the first and second sections of the act) a greater rate of freight than the rate authorized by the laws, that is fixed by the statutes, of Kansas, etc. Probably upon the organization of

Oklahoma Territory, but certainly upon the organization of the State of Oklahoma, there ceased to be any "inhabitants of said Territory." The people or residents therein ceased to be inhabitants of a Territory but became citizens or people of the state, as well as of the United States.

Certainly with the creation of the state the temporary protection against exorbitant charges would be no longer necessary since Congress in the same section delegated to such state government authority to regulate the cost of transportation therein. That authority could be exercised within the same limits as was exercised by the State of Kansas, namely, within the constitutional limit of prescribing reasonable rates, so that the people of the new state would be vouchsafed their transportation at reasonable rates or charges. The only freight rates, which were or could be authorized at the date of the passage of the act by Congress by the laws of Kansas, were reasonable rates, for the laws of Kansas fixing rates, if any, would be subject to the constitutional limitation. Indeed that was the rule prescribed by the laws of Kansas then in force. (See Sec. 11, p. 191, Session Laws of Kansas for 1883.)

Section 11, Chapter 124, Session Laws of 1883, State of Kansas, provided:

> "No railroad company shall charge, demand or receive from any person, company or corporation, an unreasonable price for the transportation of persons or property, or for the hauling or storing of freight, or for the use of its cars, or for any privilege or service afforded by it in the transaction of its business as a rail-

road company. And upon complaint in writing, made to the board of railroad commissioners, that an unreasonable price has been charged, such board shall investigate said complaint, and if sustained shall make a certificate under their seal, setting forth what is a reasonable charge for the service rendered, which shall be *prima facie* evidence of the matters therein stated."

As the object of the provision of the act of Congress heretofore quoted was to insure to the people of the given locality reasonable rates that object is accomplished with reference to the intrastate rates by permitting the new state government to regulate the same within the constitutional limits and reserving to Congress the power to regulate the interstate transportation.

## III.

IN ANY EVENT A BILL IN EQUITY DOES NOT LIE SINCE MANDAMUS IS THE APPOPRIATE REMEDY AT LAW TO ENFORCE THE PERFORMANCE OF A PUBLIC DUTY.

The remedy to compel performance of a public duty by corporations is by mandamus and not in equity. It must be sought at the instance of the sovereignty whose laws create the duty. As the federal government may enforce the duty if it still exists, manifestly the remedy lies with it and not with the state. That mandamus and not injunction is the appropriate remedy to compel the performance of public duties by corporations, see Dillon on Municipal Corporations, 4th Ed., Secs. 826, 906-908.

*In re Sawyer,* 124 U. S., 200.

*Missouri Pacific Railway Co.* v. *United States,* 189 U. S., 274.

*Attorney General* v. *Utica Insurance Company,* 2 Johnson's Chancery Reports, 371, decided by Chancellor Kent.

The main purpose of the bill, however, seems to be to secure a forfeiture of the rights and privileges granted by Congress, which could only be accomplished or effected in *quo warranto* proceedings on the part of the United States.

## IV.

THE BILL DOES NOT SET UP A CONTROVERSY BETWEEN THE STATE AND THE RAILWAY COMPANY JUSTICIABLE IN THIS COURT UNDER THE EXERCISE OF ITS ORIGINAL JURISDICTION.

The powers and rights granted to the railway company by Congress with the conditions attached were granted in the exercise of the sovereignty of the United States. In exercising that sovereignty the government represented and still represents all of the people of the country interested in the matter. It is the appropriate and only party to institute any proceeding for the protection of the public. The state made no grant and its law is not being violated. What right of the state is brought in question by the bill? What is the "controversy of a civil nature" between the state and the railway company that is involved and of which, under the Constitution, this court is given original jurisdiction? Can

a state create a controversy of a civil nature between itself and a citizen of another state by claiming that such citizen is violating the laws or the condition of a grant made by another and independent sovereignty?

*Louisiana* v. *Texas*, 176 U. S., 1, would seem to be pertinent.

Inasmuch as the Oklahoma Corporation Commission has been busy since the organization of that state in reducing and fixing rates within the state, there would seem to be little justification for filing in this court a bill of this nature.

We respectfully submit that the demurrer of respondent to complainant's bill should be sustained and the bill dismissed.

ROBERT DUNLAP,
*Attorney for Respondent.*

GARDINER LATHROP,
*Counsel.*

Office Supreme Court, U. S.
FILED.
OCT 11 1910
JAMES H. McKENNEY,
CLERK.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1910.

No. 13
Original.

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THE STATE OF OKLAHOMA,
*Complainant,*
*vs.*
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
*Respondent.*

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## DEMURRER AND MOTION FOR LEAVE TO FILE THE SAME.

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ROBERT DUNLAP,
*Solicitor for The Atchison, Topeka & Santa Fe Railway Company.*

GARDINER LATHROP,
A. B. BROWNE,
*Of Counsel.*

GUNTHORP-WARREN PRINTING CO., CHICAGO

IN THE SUPREME COURT OF THE UNITED STATES,

October Term, 1910.

No. 13, Original.

THE STATE OF OKLAHOMA,
*Complainant,*

*vs.*

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
*Respondent.*

## DEMURRER.

DEMURRER OF THE ABOVE NAMED RESPONDENT, THE TCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, TO HE BILL OF COMPLAINT OF THE ABOVE NAMED COMPLAIN-NT.

his respondent, The Atchison, Topeka and Santa Fe way Company, by protestation, not confessing or ac-vledging all or any of the matters or things in the bill of complaint contained to be true in such manner form as the same are therein set forth and alleged, demur thereto and for cause of demurrer showeth the complainant has not in and by the said bill made ated any such cause as doth or ought to entitle it to such discovery or relief as is thereby sought and ed for from or against this respondent.

nd for further cause of demurrer respondent showeth said complainant has not in and by said bill made or

stated any cause of controversy between said complainant and your respondent within the original jurisdiction of this court, but that it appears from said bill of complaint that this court is without original jurisdiction in the premises.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this respondent demurs thereto and humbly demands the judgment of this court whether it should be compelled to make any further or other answer to the said bill; and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

ROBERT DUNLAP,
*Solicitor for Respondent.*

GARDINER LATHROP,
A. B. BROWNE,
*Of Counsel.*

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

E. P. Ripley makes solemn oath and says that he is the President of The Atchison, Topeka and Santa Fe Railway Company, respondent to the foregoing bill, and that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact.

E. P. RIPLEY.

Subscribed and sworn to before me this 6th day of September, 1910.

AGNES K. DONOHUE,
[NOTARIAL SEAL] *Notary Public for Cook County, Illinois.*

My commission expires May 22, 1911.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

GARDINER LATHROP,
*Of Counsel for Respondent.*

IN THE SUPREME COURT OF THE UNITED STATES,

October Term, 1910.

No. 13, Original.

THE STATE OF OKLAHOMA,
*Complainant,*

*vs.*

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
*Respondent.*

MOTION OF RESPONDENT FOR LEAVE TO FILE DEMURRER AND TO HAVE SAME SET DOWN FOR ARGUMENT.

*To the Honorable, the Judges of the Supreme Court of the United States of America:*

The Atchison, Topeka and Santa Fe Railway Company, as respondent to the original bill of complaint filed by the State of Oklahoma, hereby prays leave, in accordance with the practice of this court in such cases, to file its demurrer, hereinbefore set forth, to said bill of complaint, and prays that the same may be set down for argument at an early day as may suit the convenience of this court.

ROBERT DUNLAP,
*Solicitor for Respondent.*

GARDINER LATHROP,
A. B. BROWNE,
*Of Counsel.*

FILED
JAN 21 1911
JAMES H. McKENNEY,
Clerk.

IN THE

# Supreme Court of the United States

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THE STATE OF OKLAHOMA,
*Complainant,*

*vs.*

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
*Respondent.*

## REPLY BRIEF FOR RESPONDENT.

ROBERT DUNLAP,
*Attorney for Respondent.*

DINER LATHROP,
*Counsel.*

GUNTHORP-WARREN PRINTING CO., CHICAGO

IN THE

# preme Court of the United States.

OCTOBER TERM, 1910.

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Original.

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THE STATE OF OKLAHOMA,
*Complainant,*

*vs.*

HE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
*Respondent.*

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## REPLY BRIEF FOR RESPONDENT.

lany of the positions taken in the State's brief as inconsistent as its prayer for relief in which sks that respondent be enjoined from enforcing charges beyond what is claimed to be a maxi- n rate rule provided for in the Act of Congress, enforcing obedience to an alleged provision of Act; next, that it be enjoined from operating railroad in the state; and then, that the grant e under the Act of Congress be forfeited to the e.

The main question as to the construction of the provision of the Act of Congress involved, which was passed to protect the "inhabitants of said Territory" (meaning the Indian Territory) in respect to freight charges, is carefully avoided. The reason for the insertion of such provision which was stated in our opening brief is virtually adopted by the learned Attorney General on page 59 of his brief, as follows:

> "The Territory had no Legislature competent to legislate on this subject. It had no commission competent to fix or modify the rate. therefore, Congress intended that the inhabitants and the people living in these territories should not be any more helpless than those of the States surrounding it, and that if any rate was authorized by the State out of which the railroad was built into the Territory, that such also should become the maximum authorized rate in the Territory."

From this he boldly jumps in the dark to the conclusion, in the face of the language of the statute, that the provision which was made for the protection of the *Inhabitants of the Indian Territory* was intended to be permanent and to inure also in favor of the people of the state or states which might thereafter be carved out of such Territory, though the reason for any such provision would cease upon statehood since Congress had authorized such state or states to regulate the charges as to transportation therein.

Again, it appears from Section 4 of the Act that, immediately following the provision in regard to freight charges, Congress provided "that passenger

rates on said railway shall not exceed three cents per mile." Then after conferring authority upon any future state government or governments to regulate the cost of transportation of persons and freight within their respective limits it was further provided "that the rate of such transportation of *passengers, local* or interstate, shall not exceed the rate above expressed." Congress was industrious to provide that on this railroad the maximum rate for passenger transportation fixed in the Act for the benefit of the inhabitants of the Territory should not even after statehood be exceeded, but the same should continue in effect for the benefit of the people of such state. But there is no provision keeping in effect after statehood for the benefit of the people of such state the maximum rule in respect to freight,—namely, that any freight rate charged the *inhabitants of the Indian Territory* should not exceed that "authorized by the *laws* of Kansas"; a rule varying according to the vagaries of each Kansas legislature. Such provision, of course, would mean the valid *statutes* of Kansas (*Brinckerhoff* v. *Bostwick*, 99 N. Y., 185; 1 N. E., 663) of which this court would take judicial notice. No statutes of Kansas fixing maximum rates on any commodities are pointed out by the Attorney General except some passed after Oklahoma statehood.

On the other hand should the provision in the Act of Congress in respect to freight charges be enlarged beyond the usual meaning of the word "laws" to include also schedules prescribed by some Railroad Commission pursuant to some statute, even then,

as we have shown in our former brief, the Kansas Railroad Commission, under the Kansas statute creating it, had only the power to promulgate schedules of reasonable rates, which schedules when promulgated were given the effect of merely *prima facie* evidence of reasonableness. They would not have the force or effect of a law fixing maximum rates, but could be merely utilized in the way of evidence in suits between shippers and carriers as to the reasonableness of charges exacted,—in which cases the same might be controverted. In the end the only rates authorized by such law were reasonable rates as finally judicially determined. The statute was one on the subject of evidence.

With reference to our construction of the provision of the Act of Congress in controversy, it is said on page 60 of opponent's brief:

> "This construction overlooks the fact that reasonableness has nothing necessarily to do with limitation by charter maxima."

Suppose that be so, yet reasonableness has something to do with the construction of statutes.

The charge in the seventh paragraph of the complaint, referring particularly to alleged failure to observe statutory rates prescribed by the State of Kansas, plainly refers to the time of the filing of the bill and in any event after Oklahoma statehood, when, as we have shown, the provisions in the Act of Congress ceased to be applicable. The allegation is "*That at this time* over the lines of said The Atchison, Topeka and Santa Fe Railway by Santa Fe Tariff No. 6240 A the rates on lime, cement and plaster, intrastate *in the State of Oklahoma* are as

follows," etc. The statutory rates in Kansas seem to have been promulgated in 1909 after Oklahoma statehood and there is in any event no charge of departure from any statutory rate, if any, prior to statehood. The seventh paragraph of the bill should, therefore, be eliminated.

The allegation in the sixth paragraph of the bill, which evidently is intended to cover something prior to statehood, is as follows:

> "That ever since the respondent took over the operation of said line of railway under said grant it has continuously and continually violated the said condition of charge in that it has charged the *inhabitants of said Territory* a greater rate of freight than the rate authorized by the laws of the State of Kansas for services or transportation of the same kind; and that said violation has been open, notorious and continuous, and that the tariffs of freight charges prepared by the respondent which are in the control of the respondent for the State of Kansas and *for the Territory of Oklahoma and Indian Territory* show in detail said excessive charges and are not known in detail to complainant."

The charge is too indefinite for answer. There would be nothing which respondent could specficially admit or deny. It states a mere legal conclusion. A bill asking extraordinary relief by injunction or forfeiture should certainly be clear and specific in its charges. It shows upon its face that the charge is made in the dark and without knowledge of any specific violation of the Act of Congress as construed even by the Attorney General. It plainly refers to the period prior to statehood. Any rates promulgated by the legislature of Kansas, or for that

matter, by its Railroad Commission, would be available to the Attorney General. The railway tariffs in force in the Indian Territory or the Territory of Oklahoma prior to statehood would be available to him if he knew of any specific instance in which such tariff did not conform to the laws of Kansas. But as we have shown, schedules promulgated by the Railroad Commission of Kansas are merely *prima facie* evidence. That board was governed by the rule of reasonableness prescribed by the statute of 1883, and its schedules might be controverted in any judicial proceeding as not being reasonable. Such schedules are not, therefore, rates authorized by the laws of Kansas.

But after all upon what theory does the State of Oklahoma ask for a forfeiture of rights granted by Congress upon the alleged ground that, during the time Congress admittedly had exclusive jurisdiction in the premises, the Railway Company prior to statehood failed to observe the Act of Congress? Was any offense committed against the State or the rights of the State in such a case?—even assuming the position taken by the Attorney General to be tenable, which, however, is not the case.

The position of the Attorney General throughout his argument as to what he wishes forfeited to the state is not very clear. Does he wish the entire railroad within the state, for which the Railway Company paid compensation in respect to right of way to the Indians and upon which it placed its own superstructure, to be forfeited to the State so that it alone may operate the same, thus breaking up the

terstate highway contemplated in the Act of Con-
ess and enabling the State to usurp franchises
anted by Congress; or does he merely contend that
e right to carry thereon intrastate commerce
ould be forfeited to the state so that there would
a dual operation of such railroad?—the state
rrying on the intrastate business and the Railway
mpany carrying on the interstate business. In
her view does he not undertake to destroy the
hts and franchise granted by Congress? And who
t Congress, the grantor, could forfeit such fran-
se?

We are not here much concerned with those cases
which the United States, after the creation of a
te, has lost title to or surrendered its proprietary
erest in any portion of the territory embraced
hin such state, or where its trust might be of a
rely municipal or local character. ([redacted] *Dick*
*United States*, 208 U. S., 340, might perhaps be
d with profit.)

The State could only claim to succeed to the
ited States in respect to this railroad upon the
ory that the federal government by reason of
tehood lost its jurisdiction, in which event its stat-
governing this railroad would cease to be ef-
tive as a valid law. The support upon which the
te is leaning would be knocked out.

But it is a mistake to say that, in respect to this
road and the franchises connected therewith, the
te is the successor of the general government.
authority of Congress in the premises is still
ctive. The power of Congress was exercised not

merely over a Territory or only as of a local nature, but as shown in our former brief it was under the power to regulate interstate commerce,—a matter of national concern. Under its power to establish post roads (as was exercised in § 3964 U. S. Revised Statutes) and to regulate commerce among the states and with the Indian tribes by authorizing the creation of an interstate highway as an instrumentality, Congress had the power, even within the limits of a state, to make the grants in question,—to authorize the construction of such a highway, and to permit the taking of tolls for its use. These are franchises.

*Wilmington Railroad* v. *Reid,* 13 Wall., 264, 268.

*Gulf & Ship Island Rld. Co.* v. *Hewes,* 183 U. S., 77.

Congress might have created a federal corporation and vested it with adequate power for such purposes.

*Luxton* v. *North River Bridge Company,* 153 U. S., 525, 529, 533.

It might have adopted, as it did in this case, a state corporation for its purposes and vested it with such permission and franchises in addition to its other franchises and powers.

*Southern Pacific Railroad Co.* v. *United States,* 183 U. S., 526, 527.

In respect to this railroad the State is or could be in no sense the successor of Congress because Congress remains the grantor, still in control for the

purposes of the grant. To be sure, the state, under authority of Congress, express or implied, may tax the physical property of such corporation within its limits, as indeed is permitted by Section 5 of the Act in question, but would have no authority to tax the operations or business carried thereon in pursuance of federal authority, because it has no jurisdiction or right over such matters.

*Railroad Company* v. *Peniston*, 18 Wall., 5, 34, 35, 36.

Even in respect to local business or charges for the use of any portion of such highway constructed under its authority, Congress, if it wished, might exercise the power of regulation, just as it regulates national banks, in many respects governing transactions of a local nature within the states. Just as Congress, in the Act in question, has undertaken to regulate local passenger rates after statehood by prescribing the maximum; and just as Congress in the Act in question has reserved to itself the right to "alter, add to, amend, or repeal" the Act involved. So also in the Safety Appliance Laws Congress has prescribed safeguards upon all cars, etc., used upon any part of interstate railways.

In respect to instrumentalities authorized by Congress for national purposes there must exist the power to regulate local or incidental matters concerning its use, as such matters and such use affect more or less the use and efficiency of such instrumentality or agency for national purposes. It is merely necessary to call attention to the case of banks organized

under acts of Congress to act as fiscal agencies of the government.

*Easton* v. *Iowa*, 188 U. S., 220, 229.
*Osborn* v. *U. S. Bank*, 9 Wh., 738, 823, 824.
*Farmers, etc., National Bank* v. *Dearing*, 91 U. S., 29.

This is true of railways.

*Matter of Dunn*, 212 U. S., 374, 383, 384.
*Pacific Railroad Removal Cases*, 115 U. S., 15, 16.

It is not necessary, however, to go to that extent in this case for it is apparent from the reading of the Act that the provision in regard to the rule of maximum freight charges is no longer in effect and because the state would have no right to have confiscated to it the franchises granted by Congress;—and that is all that in any event could be forfeited in an appropriate case. Would the State have the power by its own legislation to declare a forfeiture of the rights and property granted by Congress and thus annul or affect a congressional law? Yet that is one of the methods pursued by the sovereign power in forfeiting and taking back to itself, on account of some subsequent condition broken, that which it had granted.

We might here add that the only grounds of forfeiture specified in the Act are those found in Sections 9 and 10 thereof and to which we called attention in our direct brief, but which supply no grounds for forfeiture by reason of any matter stated in the bill.

Although the bill seeks to enforce obedience by respondent to the provision in the Act of Congress in question, it is now claimed in the State's brief, that the respondent Railway Company has no right or authority to operate the railroad constructed by the Southern Kansas Railway Company under said Act;—that Congress has not authorized the same;—but neither has Congress authorized the state to operate this railroad or exercise the franchises granted. Reference is made to a decision of the late Judge Parker in the United States District Court, Western District of Arkansas, in the case of *Briscoe* v. *Southern Kansas Railway Co.*, 40 Fed., 273, in which in an action for the killing of stock he held that a lease from the Southern Kansas Railway Company to the Atchison, Topeka and Santa Fe Railroad Company, a corporation now defunct, was *ultra vires* and, therefore, the lessor was liable for the acts of the lessee.

It is nowhere claimed in the bill filed in this case that the respondent Railway Company is operating this railroad without requisite authority, nor is it stated in what capacity or how it is operating the same, whether by lease or by virtue of acquisition by deed or otherwise. The question is not presented by the bill, and if it were, it would be sufficient to say that the Federal Government and not the State could question the legality of the transfer of the rights and privileges which Congress granted under the Act in question. The Federal Government alone could question any unlawful usurpation of federal franchises.

The learned Attorney General seems to be condemned by the language which he is at pains to quote in full on page 31 of his brief from the opinion in the case of *Utah, N. & C. R. Co.* v. *Utah & C. Ry. Co.*, 110 Fed., 879, as follows:

> "The general rule is that the question whether a railroad corporation authorized by the state has forfeited its corporate rights and franchises cannot be raised in any collateral proceeding, and *can only be taken advantage of by the sovereign power which created the corporation, because it is its privilege alone to question the right of the corporation to act under its franchise.* The state may waive the conditions, or enforce them, if it sees fit to do so."

If it were important in this case it would be easy to show that Judge Parker's decision was erroneous and that a lease or sale of the Southern Kansas Railway to the respondent company was not beyond the power of either corporation. We need merely suggest that the Act of Congress in question took up the Southern Kansas Railway Company, a Kansas corporation, invested with all the powers which the laws of that state had conferred or might confer upon such corporations, and authorized it to construct through the Indian Territory an extension to its line of railway beginning at a point on the northern line of said territory "where an extension of the Southern Kansas Railway from Winfield in a southerly direction would strike said line," etc.; —also an extension of its line in Kansas from Medicine Lodge Creek through the western part of the Territory. It was upon a state corporation vested with all the powers then conferred or which

might be thereafter conferred by the laws of such state, that Congress granted the right and privilege of constructing extensions to its lines and of using and operating such extensions in connection with its railroads in Kansas. Congress did not create a new corporation, but for its purposes took up or adopted a Kansas corporation and gave it the privilege of extending its lines and exercising its powers in a territory over which the United States had exclusive jurisdiction.

*Railroad Company* v. *Harris,* 12 Wall., 65.

The Act of Congress did not profess to take away or detract from the *powers* of this Kansas corporation or affect its corporate existence. Congress did not make it a federal corporation.

*Southern Railway* v. *Allison,* 190 U. S., 326.

Such corporation was empowered by the laws of Kansas to consolidate with another railroad company of the state, also to lease or sell its road to such other corporation.

Laws of Kansas 1870, chapter 92, amended by the Laws of 1886, chapter 134, amended by the Laws of 1887, chapter 186.

*A., T. & S. F. Railroad Company* v. *Fletcher,* 35 Kansas, 236.

*Venner* v. *A., T. & S. F. Railroad Company,* 28 Fed., 581.

So also, for that matter, the laws of the Territory of Oklahoma in Article IV, Charpter 11, Session

Laws of 1901, amendatory of the Act of 1899, authorized any railroad company whether organized under the laws of the Territory, or of any other state or Territory of the United States, owning any railroad in the Territory, to sell or lease the whole or any part of its railroad and the rights, privileges and franchises thereto pertaining, to any other railroad company organized or existing under the laws of the Territory or any other state or Territory or of the United States.

The Act of Congress in question in terms contemplated a sale of the part of the railroad constructed under its authority. Section 11 of that act provided for conveyance by mortgage of any part of its railroad by the railway company with its franchises. And Section 10 provided "that said Southern Kansas Railway Company shall accept this right of way upon the expressed condition *binding upon itself, its successors and assigns,*" etc.

Now, it certainly was not intended by Congress that the Southern Kansas Railway Company might lease or sell its lines of railway in the State of Kansas but would have no power to sell the extensions thereof constructed by permission or license from Congress. It would seem, to use a western expression, that the tail should go with the hide. The Southern Kansas Railway Company, under the general laws of Kansas which constituted its charter (*Green Bay, etc., Railroad* v. *Union, etc., Company,* 107 U. S., 98, 100, 101), and to which we may look for its powers, had power, as such corporation, to

sell or lease its entire line and appurtenant franchises and privileges, and the respondent Railway Company, as a Kansas corporation, had also the power to take such lease or acquire such line. The sale or lease would not be *ultra vires*, but would be *intra vires* of these corporations. The exercise of these powers within the Territory of Oklahoma was not opposed to but was rather in accordance with the laws and policy of that territory. Neither would the exercise of such powers be opposed to or prohibited by the Act of Congress in question because such exercise of these powers within the territory was nowhere forbidden.

It is well settled that the powers of a corporation are derived from and are dependent upon the laws of the state or sovereignty under which the corporation was created or formed. We are to look to the laws of the state of its creation for the measure of its powers. A corporation carries these powers into whatsoever state or Territory it may go and may lawfully exercise such powers in such foreign state or Territory if not prohibited by the laws thereof. Wherever the corporation goes for business it carries its charter as that is the law of its existence. It may exercise all of its powers in a foreign territory except as specifically prohibited.

See:

*Canada Southern Rld. Company* v. *Gebhard*, 109 U. S., 537.

*Railroad Company* v. *Koontz*, 104 U. S., 13.

*Relfe* v. *Rundle*, 103 U. S., 225, 226.
*P., C. & St. L. Rld. Co.* v. *C., C. & I. C. Rld. Co.*, 8 Bissell, 485.
*A., T. & S. F. Railroad Co.* v. *Fletcher*, 35 Kansas, 242, 243, *et seq.*
*Christian Union* v. *Yount*, 101 U. S., 352.

In *Pennsylvania Company* v. *St. Louis, Alton, etc., Railroad Co.*, 118 U. S., 309, it will be seen that this court looked at the law of the state under which the railroad companies were organized to ascertain whether by such law they were authorized to lease or take a lease of a railroad in another state.

The only prohibition found in the act against any sale or lease of anything granted is that found in Section 2 of the Act which forbids the leasing of any part of the right of way granted for station grounds or use thereof for other than railroad purposes, and in case any part thereof shall cease to be used for railroad purposes such part is to revert to the Indian tribe, etc. But such inhibition applies only to the station grounds and was intended to prohibit the Railway Company from disposing of any portion of its station grounds for other than railroad purposes or to private individuals or corporations for private use. It was the design of the act that the lands granted should be used for railroad purposes alone. There is no prohibition against the Southern Kansas Railway Company leasing or selling its entire line with its franchises to another railroad company which would thus be bound to oper-

ate the same in accordance with the applicable provisions of the Act of Congress.

But the United States makes no objection and has never raised any question as to the rights of respondent. Respondent has carried the mails and discharged other duties in favor of the government in accordance with the terms of the Act of Congress with the evident approval of the departments of the government. So far as dealings of the general government are concerned it has acquiesced and still acquiesces in the exercise of rights by respondent in respect to the railroad in question.

We do not deem it necessary to notice other points made in the state's brief, nor shall we attempt to criticise or differentiate the vast number of authorities cited. To do so would unduly extend this brief and perhaps be regarded as some reflection upon the acumen of this court. Judging from the application made by the learned Attorney General of many of the authorities cited by him we suspect he has gorged himself with more precedents than he has been able to assimilate or digest.

The state is not entitled to the equitable relief sought. The provision of the Act of Congress relied upon ceased to be applicable with statehood. In respect to any claim of forfeiture of rights granted by Congress no case is presented, and, in any event, the federal government, being the sovereign power which granted the rights, could alone insist upon a forfeiture. It would have the right to waive any forfeiture, and a forfeiture if decreed in

an appropriate case would inure to its benefit. It would be an indispensable party to such litigation. However, there has never been any violation of the Act of Congress.

The demurrer should be sustained and the bill dismissed.

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